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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE SIXTEENTH INSTALMENT OF "E3" CLAIMS

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Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. John Tackaberry (Chairman), Pierre Genton and Vinayak Pradhan, at its twenty-eighth session in June 1998, to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning the 17 claims included in the sixteenth instalment. Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait.

2. Based on its review of the claims presented to it to date and the findings of other panels of commissioners contained in their reports and recommendations, as approved by the Governing Council, this Panel has set out some general propositions concerning construction and engineering claims filed on behalf of corporations (the "'E3' Claims"). The general propositions are contained in annex I entitled "Summary of General Propositions" (the "Summary"). The Summary forms part of, and is intended to be read together with, this report.

3. Each of the claimants included in the sixteenth instalment had the opportunity to provide the Panel with information and documentation concerning the claims. The Panel has considered evidence from the claimants and the responses of Governments, including the Government of Iraq, to the reports of the Executive Secretary issued pursuant to article 16 of the Rules. The Panel has retained consultants with expertise in valuation and in construction and engineering. The Panel has taken note of certain findings by other panels of Commissioners, approved by the Governing Council, regarding the interpretation of relevant Security Council resolutions and Governing Council decisions. The Panel was mindful of its function to provide an element of due process in the review of claims filed with the Commission. Finally, the Panel has further amplified both procedural and substantive aspects of the process of formulating recommendations in the Summary to its consideration of the individual claims.

I. PROCEDURAL HISTORY

A. The procedural history of the claims in the sixteenth instalment

4. A summary of the procedural history of the 'E3' Claims is set down in paragraphs 10 to 18 of the Summary.

5. On 20 June 2000, the Panel issued a procedural order relating to the claims included in the sixteenth instalment. In view of:

(a) The apparent complexity of the issues raised;

(b) The volume of the documentation underlying the claims; and/or

(c) The amount of compensation sought by the claimants,

the Panel decided to classify the claims as "unusually large or complex" within the meaning of article 38(d) of the Rules. In accordance with that article, the Panel decided to complete its review of the claims within 12 months of the date of its procedural order.

6. In view of the review period and the available information and documentation, the Panel determined that it was able to evaluate the claims without additional information or documents from the Government of Iraq. Nonetheless, due process, the provision of which is the responsibility of the Panel, has been achieved by, among other things, the insistence of the Panel on the observance by claimants of the article 35(3) requirement for sufficient documentary and other appropriate evidence.

7. In drafting this report, the Panel has not included specific citations from restricted or non-public documents that were produced or made available to it for the completion of its work.

B. The claimants

8. This report contains the Panel's findings with respect to the following 17 claims for losses allegedly caused by Iraq's invasion and occupation of Kuwait:

(a) China Hebei International Economic and Technical Co-operation Corporation, a corporation existing under the laws of China, which seeks compensation in the total amount of 326,879 United States dollars (USD);

(b) China Jiangsu International Economic-Technical Co-operation Corporation, a corporation existing under the laws of China, which seeks compensation in the total amount of USD 13,575,213;

(c) China Zhejiang Corporation for International Economic and Technical Co-operation, a corporation existing under the laws of China, which seeks compensation in the total amount of USD 16,678,917;

(d) Lavcevic d.d. Split, a corporation existing under the laws of Croatia, which seeks compensation in the total amount of USD 57,819,374;

(e) Construction Social Company "Primorje", a corporation existing under the laws of Croatia, which seeks compensation in the total amount of USD 25,070,347;

(f) Babcock Entreprise, a corporation existing under the laws of France, which seeks compensation in the total amount of USD 678,125;

(g) Beicip-Franlab, a corporation existing under the laws of France, which seeks compensation in the total amount of USD 187,928;

(h) Cegelec, a corporation existing under the laws of France, which seeks compensation in the total amount of USD 21,532,440;

(i) Cogelex Alsthom, a corporation existing under the laws of France, which seeks compensation in the total amount of USD 1,614,391;

(j) Larsen & Toubro Limited, a corporation existing under the laws of India, which seeks compensation in the total amount of USD 20,039,525;

(k) Hitachi Zosen Corporation, a corporation existing under the laws of Japan, which seeks compensation in the total amount of USD 411,404;

(l) Ashco International Corporation, a corporation existing under the laws of Jordan, which seeks compensation in the total amount of USD 31,420,807;

(m) Construction Company Pelagonija, a corporation existing under the laws of the former Yugoslav Republic of Macedonia, which seeks compensation in the total amount of USD 1,079,859;

(n) Van Oord International B.V., a corporation existing under the laws of the Netherlands, which seeks compensation in the total amount of USD 28,410,266;

(o) Folcra S.A., a corporation existing under the laws of Spain, which seeks compensation in the total amount of USD 190,581;

(p) Turkish Joint Venture (TJV), a joint venture existing under the laws of Turkey, which seeks compensation in the total amount of USD 38,261,010; and

(q) Merz and McLellan Limited, a corporation existing under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 623,173.

9. These amounts claimed in United States dollars represent the alleged loss amounts after correction for applicable exchange rates as described in paragraphs 55 to 57 of the Summary.

II. CHINA HEBEI INTERNATIONAL ECONOMIC AND TECHNICAL CO-OPERATION CORPORATION

10. China Hebei International Economic and Technical Co-operation Corporation ("Hebei") is a Chinese, state-owned entity involved in engineering projects outside China, import/export trade, and the provision of labour services. Its claim relates to two contracts under the terms of which Hebei would supply manpower in Kuwait. Hebei seeks compensation in the total amount of USD 326,879 for asserted losses relating to loss of tangible property and payment or relief to others. Hebei also makes a claim for interest.

11. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Hebei's claim for interest.

Table 1. Hebei's claim

Claim element	Claim amount (USD)
Loss of tangible property	15,058
Payment or relief to others	311,821
Total	326,879

A. Loss of tangible property

1. Facts and contentions

12. Hebei seeks compensation in the amount of USD 15,058 (4,351.75 Kuwaiti dinars (KWD)) for loss of tangible property. It states that due to the effects of Iraq's invasion and occupation of Kuwait, it had to evacuate its staff back to China via Jordan leaving behind its tangible property. The staff members departed Jordan on 28 August 1990.

13. The tangible property included in the claim consists of a "feng tian car", typewriters, a radio, a camera and two radio cassette players. In its reply to the article 34 notification, Hebei states that all the property for its Kuwait office was purchased locally. Upon its staff withdrawing from Kuwait on 27 August 1990, the assets were locked in the compound of the Kuwait office. Hebei states that upon cessation of hostilities it sent its interpreter to Kuwait who discovered that the property was missing.

2. Analysis and valuation

14. The evidence submitted by Hebei consists of receipts and cash invoices. In its reply to the article 34 notification, Hebei explained that the receipt relating to the purchase of the motor vehicle was not in its name but in the name of an employee, as the law in Kuwait required purchases of items to be made in the name of an individual. There is a statement from the employee confirming Hebei's ownership of the motor vehicle.

15. The Panel finds that Hebei submitted sufficient evidence to demonstrate that the property was in Kuwait and that it owned the property. Accordingly, after applying an appropriate depreciation rate, the Panel recommends compensation in the amount of KWD 2,491.

3. Recommendation

16. The Panel recommends compensation of USD 8,619 for tangible property losses.

B. Payment or relief to others

1. Facts and contentions

17. Hebei seeks compensation for payment or relief to others totalling USD 311,821 (1,472,417 Yuan (CNY)). This portion of the claim consists of "settling allowances" and airfares allegedly paid in connection with its 146 personnel in Kuwait.

18. Hebei was involved in two contracts in Kuwait at the time of Iraq's invasion and occupation of Kuwait. Hebei, on 1 March 1987, signed a contract with Kuwait Catering Company ("KCC") to supply manpower. The contract duration is stated by Hebei as three years.

19. Hebei entered into a subcontract on 27 September 1989 with a Kuwait-based entity, Adasani Contracting Est. ("Adasani"). The contract was for the supply of manpower up to a maximum of 100 people for the Al-Qurain Housing project. At the time of Iraq's invasion and occupation of Kuwait, Hebei states that the unexecuted portion of the contract was 14 months.

20. The claim for payment or relief to others relates to the 98 persons working on the project with Adasani and 48 others who were employed by the Kuwaiti office of Hebei and the KCC project.

(a) Settling allowances

21. Hebei seeks compensation for USD 117,193 (CNY 553,386) for settling allowances. Hebei states that as a result of Iraq's invasion and occupation of Kuwait on 2 August 1990, it flew its 146 personnel back to China from Jordan on 28 August 1990. In order to provide for the "livelihood" of its employees upon their return to China and to assist its employees in resettling, Hebei states that it paid the employees three months' salary.

22. Hebei's reply to the article 34 notification indicates that a settling allowance was not payable ordinarily. Hebei states that the 98 workers on the contract with Adasani had not in fact been paid their salary for the months of June and July 1990. There were often delays of about a "half a month or even a month" in effecting salary payments by the contractor.

23. Hebei did not state what responsibilities it had relating to the payment of the workers. Hebei provided a copy of the contract between itself and the workers. The contract states what the salary will be. However, it does not state who will pay it. It further states that Hebei will be responsible for the worker's food and medical care in Kuwait.

24. Upon the workers' arrival in China, they made representations to Hebei for payment of their salaries and, it appears, losses to their personal property. The responsibility for the salary payments, according to Hebei, was with the Kuwaiti client. In subsequent submissions, Hebei confirmed that Adasani was responsible for the payment of the salaries.

(b) Airfares

25. Hebei seeks compensation in the amount of USD 194,628 (CNY 919,031) for air tickets purchased for the repatriation of 146 personnel from Jordan to China. The flights occurred on 28 August 1990 on a Chinese government chartered Air China flight. This included a claim for "war risk" insurance *premia* of USD 52,268.

26. With respect to the contract with Adasani, Hebei was responsible for providing return air tickets from China to Kuwait for all its personnel. The contract with Adasani also stipulates that the personnel should be employed in Kuwait for two years and Adasani should do its "utmost" to arrange work for them at its site or assist them to find work on other similar projects. In the event of a lack of work available for the personnel, Adasani was requested to "bear certain percentage of the air-tickets accordingly to send the people back to China".

27. In the contract with KCC, the responsibility for the return air tickets from China to Kuwait rested with the Kuwaiti employer. Hebei claims for 48 tickets at a cost of USD 63,826 arising out of the contract with KCC.

2. Analysis and valuation

(a) Settling allowance

28. The Panel finds that with respect to payments made by Hebei to its employees for the months of June 1990 and July 1990, the obligation to make such payments rested with Adasani, not Hebei. Hebei, therefore, should be seeking compensation from the Kuwaiti contractor. Accordingly, the Panel recommends no compensation for the salary payments for June and July 1990.

29. The further issue that arises relates to the salary payments for August 1990 and whether Hebei had a responsibility to pay these amounts. Hebei indicates that "although no construction was organized, the workers actually did some work on the sites including protecting the property and collecting tools and goods etc." The Panel finds that the workers were involved in work that related essentially to mitigation of potential losses. Accordingly the Panel finds that salary payments made for the month of August 1990 are compensable and recommends compensation in the amount of USD 39,064.

30. With respect to the claim for loss of personal possessions of the employees, Hebei did not submit proof of the amount paid, proof of the employees' ownership of the property or that such property was in Kuwait. The Panel recommends no compensation for this loss element.

(b) Airfares

31. In support of its claim, Hebei submitted a copy of the contract with KCC, correspondence with Air China, a schedule of personnel and confirmation from Air China of payment. The Panel finds that the airfares relating to the project with KCC are compensable in principle as these were costs that should have been borne by KCC and therefore exceeded the costs that Hebei would have incurred upon natural completion of the contract. The Panel recommends compensation in the amount of USD 63,826.

32. The Panel finds that, with respect to the contract with Adasani, the costs for airfares would have been borne by Hebei. In response to a query in the article 34 notification as to how the costs claimed would have exceeded the costs upon natural completion of the contract, Hebei asserts that the flight from Jordan to China was longer than from Kuwait to China. Hebei also submitted documentation from Air China dated 6 September 2000 which states that the average air ticket for a return air ticket from China to Kuwait was USD 971 and the cost of a one way air ticket at the time was USD 530 per person.

33. The Panel finds that the difference between the cost of a single fare and what was actually paid by Hebei represents an extraordinary expense. Accordingly, the Panel recommends compensation in the amount of USD 43,288.

34. With respect to the claim for the "war risk" insurance premia, Hebei submitted documentation from Air China dated 6 September 2000 which indicates that the premium for "war risk" insurance was USD 358 per person. As evidence of payment, Hebei submitted confirmatory documentation from Air China. The Panel recommends compensation for "war risk" insurance premia in the amount of USD 52,268.

3. Recommendation

35. The Panel recommends compensation in the amount of USD 198,446 for payment or relief to others.

C. Summary of recommended compensation for Hebei

Table 2. Recommended compensation for Hebei

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	15,058	8,619
Payment or relief to others	311,821	198,446
Total	326,879	207,065

36. Based on its findings regarding Hebei's claim, the Panel recommends compensation in the amount of USD 207,065. The Panel finds the date of loss to be 2 August 1990.

III. CHINA JIANGSU INTERNATIONAL ECONOMIC-TECHNICAL CO-OPERATION CORPORATION

37. China Jiangsu International Economic-Technical Co-operation Corporation ("Jiangsu") is a Chinese state-owned entity. Its claim relates to 11 contracts for the supply of manpower in Kuwait. Typically, a Kuwaiti authority or entity would employ a Kuwaiti main contractor who would enter into a subcontract with Jiangsu which would, in turn, enter into a subcontract with another Chinese entity to provide labour for the latter's execution of the project. Jiangsu stated that due to Iraq's invasion and occupation of Kuwait, it began the repatriation of its staff from Kuwait on 23 August 1990. Jiangsu seeks compensation in the total amount of USD 13,575,213 for contract losses, loss of profits, loss of tangible property, payment or relief to others, claim preparation costs and interest.

38. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Jiangsu's claim for interest.

Table 3. Jiangsu's claim

Claim element	Claim amount (USD)
Contract losses	6,398,194
Loss of profits	695,453
Loss of tangible property	446,775
Payment or relief to others	3,772,443
Financial losses (interest)	2,064,356
Claim preparation costs	197,992
Total	13,575,213

A. Contract losses

1. Facts and contentions

39. Jiangsu seeks compensation in the total amount of USD 6,398,194 for asserted contract losses arising out of 11 contracts in Kuwait. The asserted losses are summarised in table 4, infra.

Table 4. Jiangsu's claim for contract losses

Contract	Employer	Main contractor	Subcontractor	Labour supply for subcontractor	Claim amount (KWD)
Construction of 281 houses	NHA a/	Jirfan Trad. & Contracting Co. ("Jirfan")	Jiangsu	Wuxi Gen. Construction Engineering Corp. ("Wuxi")	287,117
Construction of 142 houses	NHA	Al-Khamis & Al-Aryan Trad. & Cont. Co ("Al-Khamis")	Jiangsu	Xuzhou Overseas Project Development Corp. ("Xuzhou")	172,981
Construction of 417 houses	NHA	Al-Rabiah Construction Co. ("Al-Rabiah")	Jiangsu	Changzhou Construction Co. ("Changzhou")	542,624
Construction of 268 houses	NHA	International Contractors Group ("ICG")	Jiangsu	Xuzhou	535,014
Construction of Telephone Exchange Centre	NHA	Al-Othman Trad.& Cont. Co. ("Al-Othman")	Jiangsu	Jianhu Constr. Engineering Corp. ("Jianhu")	15,848
Construction of 420 houses	NHA	Al-Baidaa Trad.& Cont. Co. ("Al-Baidaa")	Jiangsu	Yangzhou Constr. & Installation Engineering Co. ("Yangzhou")	242,265
Construction of police station	MPW b/	Al-Baidaa	Jiangsu	Nantong Constr. & International Co. ("Nantong")	18,689
Constr. of Headquarter Build. Of Audit Bureau	MPW	Al-Baidaa	Jiangsu	Nantong	5,550
Works for Primary School at Al-Qurain	RECAFCO	Al-Fadala Construction Co. ("Al-Fadala")	Jiangsu	Nantong	7,501
Maintenance of 100 housing Units of S/L Brick works	NHA	Aziz Constructions ("Aziz")	Jiangsu	Nantong	12,255
Primary schools Al-Salom	RECAFCO c/	Al-Fadala	Jiangsu	Nantong	9,234
Total					1,849,078

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a/ National Housing Authority of Kuwait

b/ Ministry of Public of Works

c/ KW Real Estate Construction & Fabrication Co.

40. On all the contracts, the employer was a Kuwaiti authority or entity, and the main contractor was a Kuwaiti entity. The main contractor subcontracted the contract to Jiangsu. Jiangsu, in turn, entered into a "labour service contract" with a number of other Chinese entities "to take the responsibilities of the project construction under the guidance" of Jiangsu. The typical arrangement Jiangsu had involved the Chinese entity supplying labour and implementing the contract. In terms of the labour service contracts, Jiangsu was responsible for signing and negotiating contracts with foreign companies. It also organized the visas and travel for the labour.

41. Jiangsu's responsibilities also included inspecting the work of project managers and guiding them accordingly. It co-ordinated with the provincial government of Jiangsu and the Ministry of Foreign Economic Relations and Trade concerning the financial aspects of the subcontract. The other Chinese entities were responsible for selecting the workers, implementing the contract and sending financial information to Jiangsu. Under the applicable financial arrangements Jiangsu charged a fee of 12 per cent of the income of the project as a management fee.

42. The claim for contract losses consisted of certified work, uncertified work and retention monies. Jiangsu also submitted claims relating to "operation income" and "management income" as part of its contract losses. The Panel is of the view that these asserted losses are more appropriately classified as loss of profits and accordingly treats them as such.

2. Analysis and valuation

43. The payment conditions in the contracts submitted by Jiangsu were one of two types. The first type included a condition that payment would only be made by the main contractor as and when the main contractor had itself received payment from the employer ("pay when paid clauses"). The second type of payment arrangement entitled Jiangsu to payment from the main contractor for work performed in terms of the contract irrespective of the main contractor having received the corresponding payment from the employer. This is a convenient point for the Panel to summarise some general principles relating to subcontractors and pay when paid clauses, both of which are applicable to Jiangsu.

(a) Subcontractors and suppliers

44. Construction contracts involve numerous parties who operate at different levels of the contractual chain. In the simplest form there will almost always be an employer or project owner; a main contractor; subcontractors and suppliers. Usually each member of the chain will be in a contractual relationship with the party above and below it (if any) in the chain; but not with a party outside this range.

45. The claims before the Commission often include ones made by parties in different positions in the same chain and in relation to the same project. In resolving these claims, this Panel, basing itself on its own work and on that of other panels, has come to recognise certain principles which appear to be worth recording. Of course these general propositions are not absolute – there will always be exceptions in special circumstances.

(i) Projects within Iraq

46. The first principle that should be noted is the distinction between projects which were going forward within Iraq and those that were going on outside Iraq. Different considerations apply in the two situations. A notable example of this difference is the limitation on the Commission's jurisdiction which flows from the "arising prior to" principle - see Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E2" Claims (S/AC.26/1998/7), paragraph 90. In the view of this Panel, this jurisdictional limitation applies to all claims made in respect of projects in Iraq, regardless of where in the contractual chain the claimant might be.

47. This jurisdictional limitation flowed from the need to deal in an appropriate manner with political and historical realities in Iraq. Similarly current realities in that country require this Panel to acknowledge that the normal processes of payment down the contractual chain do not operate in Iraq, at least so far as projects that commenced before Iraq's invasion and occupation of Kuwait are concerned. In these circumstances, it is unnecessary to review the operation of the contractual chain – the assumption must be that it is not operating. Consequently, claims may properly be filed with the Commission by any party anywhere in the contractual chain. Naturally this approach does not detract from or modify the obligation of a claimant pursuant to Governing Council decision 13 (S/AC.26/1992/13) to inform the Commission of any payments in fact received which go to moderate or extinguish its loss. The Panel notes that this obligation has, so far as this Panel can judge (by its review of the claims filed, the follow up information provided when asked for, and extensive cross checking against the myriad other claims filed with the Commission) been almost wholly honoured by claimants.

48. Both past and present realities may lead, as more claims are investigated, to other dissimilarities between the treatment of projects within and outside Iraq.

(ii) Projects outside Iraq

49. Where the project out of which a claim arises was sited outside Iraq (as to which see also paragraphs 61-63 of the Summary) and particularly where it was sited within Kuwait, the situation is more complicated. The Kuwaiti situation, being, obviously, the most common one, is a convenient one to use as an example. In Kuwait today, ministries are back in full operation. Kuwaiti companies have in many cases resumed business. Projects have been restarted and completed. Claims arising out of Iraq's invasion and occupation of Kuwait have been lodged and resolved.

50. In these circumstances, the risk of double rewards or unjustifiably enhanced reimbursement of claimants is greater; and it is necessary to proceed with caution. Doing so, the following propositions can be seen to be generally applicable.

51. A claimant that is not at the top of the contractual chain and which wishes to recover for a contract loss will usually have to establish why it is not able or entitled to look to the party next up the line. There are many possible explanations which such a claimant may be able to rely on when thus establishing its locus standi. The bankruptcy or liquidation of the debtor is one; another is that the

contractual relation between claimant and debtor is subject to a contractual bar which does not apply in the context of claims to the Commission; another is that there has been an assignment or other arrangement between the two parties which has allowed the claimant to bring the claim.

52. Where such an explanation is established by sufficient evidence, this Panel sees no great difficulty in principle in entertaining the claim.

53. Where no such ground is established (either by the evidence of the particular claimant or extraneously, for example by the evidence put forward in some other claim before the Commission) this Panel is prima facie obliged to assume that the next party up the chain is in existence and solvent. In that event, the claimant's loss would not appear to be caused directly by Iraq's invasion and occupation of Kuwait but by the failure of the debtor to pay. An example might be where a subcontractor is out of his money for work done; where the contractor would, if so minded be entitled to recover it from the owner; but where, for whatever the reason, the contractor is not pursuing the claim against the owner and is, at the same time, refusing to reimburse the subcontractor out of his own pocket. If that is the end of the story it will be difficult if not impossible for this Panel to recommend payment of the claim.

(iii) "Pay when paid" clauses

54. Many construction contracts in wide use in various parts of the world contain what are called "pay when paid" clauses. Such a clause relieves the paying party – most usually the contractor – from the obligation to pay the party down the line - the subcontractor in the usual example – until the contractor has been paid by the owner. The aim of such a clause is to assist in the planning of the cash flow down the contractual chain. The effect of such a clause is to modify the point in time at which the entitlement of the next party down the chain to be paid for its work accrues.

55. Such a clause falls to be distinguished from a "back to back" arrangement. This latter expression refers to the situation where the terms of two contracts in a chain are identical as to obligations and rights. Thus – continuing the example of the owner, main contractor and subcontractor – in a "back to back" situation, the obligations owed by the contractor to the owner and his rights against the owner will be mirrored in the rights and obligations of the subcontractor and the contractor. This type of situation does not, of itself, in any way inhibit the ability of the subcontractor to seek relief independently of what is happening or has happened between the contractor and the owner.

56. A "pay when paid" clause, while superficially attractive – among other effects the main contractor and the subcontractor may both be said to be at risk of non payment by the owner – has been shown by experience in many jurisdictions to be easy for main contractors seeking to avoid fair payment for work done by their subcontractors to abuse. It also creates problems for the subcontractor when the main contractor is disinclined to pursue the subcontractor's claim against the owner, a situation that can easily come about – e.g. where pursuing such a claim may lead to a cross claim by the owner against the contractor in respect of matters that cannot be passed back down to the subcontractor.

57. Such clauses are to be found in some of the contracts utilised in projects which have given rise to the claims to the Commission. The question arises therefore as to whether such clauses are relevant for the purposes of determining the claimant's entitlement. To put it another way, does the existence of such a clause affect the causative chain between Iraq's invasion and occupation of Kuwait and the claimed loss?

58. It seems to this Panel that the answer to this question will vary according to the circumstances. However, where the sole effect of the clause would be to prevent a claim by a subcontractor to the Commission, then the clause falls to be ignored. Such a clause appears to this Panel to be comparable, in this context, to frustration and force majeure clauses. For example, in respect of contracts involving Iraq, Governing Council decision 9 (S/AC.26/1992/9) made it clear that Iraq could not avoid its liability for loss by reliance upon the provisions of frustration and force majeure clauses. It would be odd, therefore, if such liability could be avoided by the operation of a provision such as a "pay when paid" clause.

59. In the present case it is clear from the contract documentation submitted by Jiangsu that Jiangsu is in the position of subcontractor as described above. Also a number of subcontracts into which it entered into with Kuwaiti main contractors contained "pay when paid" clauses. Accordingly, when valuing Jiangsu's claims, the Panel has borne in mind the principles stated above and has concluded that Jiangsu's entitlement is not inhibited by the "pay when paid" clauses.

60. In support of its claims, Jiangsu submitted the contract agreements and the labour service contracts. It also submitted instalment payment certificates for part of the work performed. With respect to the claims for certain elements of the work done, Jiangsu asserts that it could not get this work certified "due to the war". Jiangsu submits unauthenticated documentation in support of this contention.

61. Where Jiangsu established that the losses were directly caused by Iraq's invasion and occupation of Kuwait and produced sufficient documentary evidence the Panel has recommended compensation in an appropriate amount. The Panel recommends compensation as outlined in table 5, infra. With respect to the claim for work done but uncertified, the Panel recommends no compensation.

Table 5. Jiangsu's claim for contract losses – Panel's recommendations

Claim element	Claim amount (KWD)	Recommended compensation (KWD)
Construction of 281 houses	287,117	71,406
Construction of 142 houses	172,981	88,354
Construction of 417 houses	542,624	109,810
Construction of 268 houses	535,014	nil
Construction of telephone exchange Centre	15,848	9,180
Construction of 420 houses	242,265	nil
Construction of Police station	18,689	8,068
Construction of Headquarter Building of Audit Bureau	5,550	3,160
Works for primary school at Al-Qurain	7,501	nil
Maint. of 100 housing units of S/L Brick works	12,255	nil
Primary schools Al-Salom	9,234	nil
Total	1,849,078	289,978

3. Recommendation for contract losses

62. The Panel recommends compensation in the amount of USD 1,003,384 for contract losses.

B. Loss of profits

1. Facts and contentions

63. Jiangsu seeks compensation in the amount of USD 695,453 for loss of profits.

64. Jiangsu submitted claims relating to what it termed a management fee or overhead and what it termed operation income or loss of profits as part of its contract loss claim. The Panel has reclassified those asserted losses as loss of profits claims. Jiangsu asserts that according to the labour service contract it is entitled to 12 per cent of the total income as an overhead expense. It bases its calculation on the management fee owed on the amount of work which was not completed under the contract as at 2 August 1990.

65. Jiangsu's claim is detailed in table 6, infra. In calculating its loss of what it termed operating income, Jiangsu takes its asserted average profits for the years 1987, 1988, 1989 and 1990, and applies that figure, 9.4 per cent, to the work that it asserts was not done as of 2 August 1990. The projects for which Jiangsu asserted what it termed loss of management fee and operation income are shown in the table 6, infra.

Table 6. Jiangsu's claim for loss of profits

Project	Labour service contractor	Management fee (overhead claimed) (KWD)	Operation income (loss of profit)
281 houses	Wuxi	69,842	54,709
142 houses	Xuzhou	295	231
Telephone exchange	Jianhu	10,405	8,150
417 houses	Changzhou	3,391	
Police Quarters	Nantong	6,413	5,023
Headquarter Building, Audit	Nantong	9,331	7309
Primary School	Nantong	3,045	2,385
Repairing 100 houses	Nantong	6,635	5,198
Al-Salom school	Nantong	4,836	3,788
Total		114,193	86,793

2. Analysis and valuation

66. In its contentions in support of what it called loss of profit, Jiangsu submitted "Income Statement In the Successive Five Years", and copies of the contracts. The Income Statement is a global income statement for the Kuwaiti Middle East Branch. Jiangsu did not submit specific information relating to each project. The following types of evidence might have been provided for each project for which loss of profits was claimed: audited financial statements, budgets, management accounts, turnover, original bids, profit/loss statements, finance costs and head office costs prepared by or on behalf of Jiangsu for each accounting period commencing in year one of the project and continuing through March 1993.

67. The length of time claimed for the loss of profits varies by project but is based on the unexpired portion of each contract. Evidence demonstrating that the projects had proceeded or were proceeding as planned was not submitted. Such evidence may be found in such documents as monthly/periodic reports, planned/actual time schedules, interim certificates or account invoices, details of work that was completed, but not invoiced, by Jiangsu, details of payments made by the employer and evidence of retention amounts that were recovered by Jiangsu. Such evidence was not submitted.

68. The Panel finds that Jiangsu failed to fulfil the evidentiary standard for loss of profits claims as set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation.

3. Recommendation

69. The Panel recommends no compensation for loss of profits.

C. Loss of tangible property

1. Facts and contentions

70. Jiangsu seeks compensation in the amount of USD 446,775 for loss of tangible property in Kuwait. The property includes motor vehicles, camp facilities, tools, and office equipment. Jiangsu asserts that when Iraq invaded Kuwait on 2 August 1990, all its workers left the project sites and abandoned the property on the sites. Jiangsu states that when officials from its Middle East branch returned to Kuwait, they discovered that the property on the campsite was no longer present. Jiangsu's claim per project is detailed in table 7, infra.

Table 7. Jiangsu's claim for loss of tangible property (loss per project)

Project	Claim amount (USD)
Construction of 281 houses	69,981
Construction of 142 houses	77,141
Construction of 417 houses	140,914
Construction of telephone exchange Centre	3,374
Construction of 420 houses	16,075
Construction of Police Station	6,041
Construction of Audit Bureau	13,640
Works for Primary School at Al-Qurain	12,457
Repairing 100 Houses of S/L Brick Works	14,345
Construction of Al-Salom School	12,457
Middle East Branch of Jiangsu	80,350
Total	446,775

2. Analysis and valuation

71. In support of its claim for tangible property losses, Jiangsu submitted various documentation including copies of the contracts, receipts and invoices. In certain instances, Jiangsu did not submit receipts as it stated that these were lost as a result of the "war". Jiangsu sought to rely on specific contract clauses to support its claim, but the Panel found that a number of those contract clauses relied upon by Jiangsu were not relevant to the particular loss asserted. In addition, the Panel found that a number of the projects were close to completion and therefore specific items claimed, for example, hand tools, would have been fully depreciated.

72. The Panel recommended compensation where Jiangsu demonstrated that the tangible property loss arose as a direct result of Iraq's invasion and occupation of Kuwait and submitted sufficient evidence to establish the loss. The Panel's conclusions with respect to Jiangsu's claim for tangible property losses are summarised in table 8, infra.

Table 8. Jiangsu's claim for tangible property losses – Panel's recommendations

Claim element	Claim amount (KWD)	Recommended compensation (USD)
Construction of 281 houses	69,981	34,125
Construction of 142 houses	77,141	Nil
Construction of 417 houses	140,914	1,824
Construction of telephone exchange Centre	3,374	1,913
Construction of 420 houses	16,075	2,502
Construction of Police Station	6,041	Nil
Construction of Audit Bureau	13,640	Nil
Works for Primary School at Al-Qurain	12,457	Nil
Repairing 100 Houses of S/L Brick Works	14,345	Nil
Construction of Al-Salom School	12,457	Nil
Middle East Branch of Jiangsu	80,350	11,291
Total	446,775	51,655

3. Recommendation

73. The Panel recommends USD 51,655 for loss of tangible property.

D. Payment or relief to others

74. Jiangsu seeks compensation in the amount of USD 3,772,443 for payment or relief to others.

75. This loss element includes the claim that Jiangsu described in the category "E" claim form as "other" losses. The losses are summarised in table 9, infra:

Table 9. Jiangsu's claim for payment or relief to others

Project	Mobilisation (USD)	Losses for workers not repatriated (USD)	Settlement allowance in China (USD)	Daily allowances (USD)	Trip to Jordan (USD)	Travel to China (airfares and insurance) (USD)	Expenses in China (USD)	Unclaimed cost of air ticket (USD)
281 houses	68,929	12,600	256,800	298,809	15,158	1,023.264	15,306	178,114
142 houses		12,600	56,441	52,122		178,704	13,919	
417 houses			39,300	46,767	1,945	160,344	3,577	
Telephone Exchange	9,100		21,000	19,720	1,725	85,680	1,310	25,525
420 houses			6,900	8,211		28,152	2,411	
Police	14,123	3,600	30,600	36,414	2,074	124,848	4,780	
Audit Bureau	20,000							
Primary school	9,000							
100 houses	5,580	2,400	27,900	33,201	1,265	113,832	4,142	
Al Saiom	9,000							
Middle East Branch						8,568		
United Payment					572,735		103,948	
Total	135,732	31,200	438,941	495,244	594,902	1,723,392	149,393	203,639

76. The claim for payment or relief to others, as submitted by Jiangsu, is divided on a project by project basis and includes the following loss items:

(a) Mobilisation fee

77. Jiangsu states that according to the labour services contract, a certain number of workers would be employed on a contract. Under the terms of the labour services contract, Jiangsu stated that it had to pay USD 200 for each of the workers on the contract. It seeks compensation relating to these payments over the unexpired portion of the contract. For example, with respect to the 281 house project, it calculates its entitlement as follows: USD 200 per worker x 837 workers x (17-10) month ÷ by 17 months = USD 68,929.

78. Under the terms of the labour supply contracts that Jiangsu entered into with Chinese entities, the standard arrangement was:

> "To pay Party B USD 200 (or equivalent amount of Chinese currency) as the mobilisation fee to each of the workers to assist them in making necessary preparations before leaving China and it would be repaid to Party A monthly during the work period."

79. In its reply to the article 34 notification, Jiangsu states that it expected to amortise the mobilisation fee on a monthly basis over the life of the contract.

(b) Workers who were not sent to Kuwait

80. Jiangsu seeks compensation relating to the USD 200 payments that it made to the workers who were not able to travel to Kuwait pursuant to the labour services contract. It is Jiangsu's contention that the USD 200 payment was made for the number of workers on the contract. In certain instances, which are unclear to the Panel, it alleges that some of these workers were unable to travel to Kuwait because of Iraq's 22 August 1990 invasion and occupation of Kuwait.

(c) Unrefunded cost of air tickets for transporting workers to project site in Kuwait

81. Jiangsu asserts that at the commencement of the contract, it paid for the costs of transporting the workers to Kuwait. This amount, it asserts, would be paid back to it, by monthly instalments, in the course of implementation of the contract. Jiangsu seeks compensation relating to those instalments that were not paid to it. With respect to the 281 Project, Jiangsu asserts a loss of KWD 52,387 (converted by Jiangsu to USD 178,114) The cost is calculated as follows:

KWD 152 per capita X 837 workers x 7 months/ 17 months = KWD 52,387.

82. The asserted loss for the telephone exchange project is based on a "loss" of repayments for the cost of the air tickets over 13 months. The asserted loss is stated as KWD 7507 (converted by Jiangsu to USD 25,525).

83. With respect to the claims for: (a) mobilisation fee; (b) workers who were not sent to Kuwait; and (c) unrefunded cost of air tickets for transporting workers to the project site in Kuwait, this Panel notes that it has dealt with the issue of mobilisation type costs in its previous reports. In the Panel's previous reports it has considered such claims as part of a loss of profits claim. The Panel accordingly reclassifies this claim as a loss of profits claim.

84. The evidence submitted by the Jiangsu consists of the labour supply contracts and contracts with the main contractors.

85. Jiangsu was requested to submit an explanation as to the costs, how it charged for them in the contract and what percentage of the total costs in the contract this represented. A confirmation of the method of calculating the amortisation of the mobilisation fee is provided again in the supplemental documentation submitted by Jiangsu. No further information was provided. This "additional information" confirms the above calculation previously submitted by Jiangsu but does not provide the explanations and additional information specifically requested by the Panel.

86. The Panel finds that Jiangsu failed to fulfil the evidentiary standard for loss of profits claims as set out in paragraphs 125 to 134 of the Summary. Accordingly, the Panel recommends no compensation for (a) mobilisation fee; (b) workers who were not sent to Kuwait; and (c) unrefunded cost of air tickets for transporting workers to the project site in Kuwait .

(d) Settlement allowances in China

87. Jiangsu seeks compensation relating to settlement allowances that it asserts it paid the workers in China. This obligation was based on the labour services contract. Jiangsu states that it was obliged to pay each worker the amount of USD 300 as a settlement allowance. The standard contract signed with the Chinese entity which provided the labour stated:

> "To send the workers of Party B back to China when they cannot continue to work in Kuwait prior to the normal termination of service period due for reasons not caused by Party B and pay USD 300 (or equivalent amount in Chinese currency) to each of them as an allowance for settling."

88. In support of the claim for the settlement allowance, Jiangsu submitted copies of the contracts with the workers, receipts for the payment and a copy of a schedule of payments. The Panel finds that these payments represent a direct loss and recommends compensation in the total amount of USD 418,738.

89. This claim also includes an amount paid for a worker on Project 281 who was killed by the Iraqi army. Jiangsu asserts that it compensated his family the amount of CNY 30,000. In support of this claim, Jiangsu submitted a schedule with the deceased worker's wife's signature as having been paid. The Panel finds that this payment was an extraordinary expense caused directly by Iraq's invasion and occupation of Kuwait and accordingly recommends compensation in the amount of USD 6,353.

(e) Payments made to workers from 2 to 23 August 1990

90. Jiangsu seeks compensation for the daily allowance that it states it paid its workers from 2 August 1990 to the date of their repatriation to China on 23 August 1990. The daily amount paid is asserted as KWD 5 per day. Jiangsu submitted copies of the contracts, receipts of payments and a schedule of payments.

91. The Panel finds that these costs are compensable in principle as extraordinary expenses resulting directly from Iraq's invasion and occupation of Kuwait and that Jiangsu adequately supported its claim. The Panel recommends compensation in the total amount of USD 495,244.

(f) Cost of trip from Kuwait to Jordan

92. Jiangsu seeks compensation for the cost of travel from Kuwait via Iraq to Jordan allegedly incurred. The workers departed Kuwait by bus on 23 August for Jordan via Iraq. Jiangsu seeks compensation for the cost of transport and accommodation.

93. Jiangsu submitted no evidence of the nature of the expenses or any evidence other than advice notes from China National Complete Plant Export Corporation. The Panel finds that there is insufficient evidence submitted for it to verify the costs incurred. Accordingly, it recommends no compensation.

(g) Cost of trip from Jordan to China

94. Jiangsu seeks compensation for the asserted cost of flying workers from Amman, Jordan, to Shanghai, China. The cost of insurance is stated as USD 250 per person.

95. The Panel finds that Jiangsu had the responsibility for the costs of the airfares. Jiangsu submitted documentation which states that the average return air ticket's cost was USD 974 and the cost of a single trip air ticket at the time was USD 510 per person.

96. The Panel finds that the difference between the cost of a single fare and what was actually paid by Jiangsu represents an extraordinary expense resulting directly from Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends compensation in the amount of USD 653,312.

97. With respect to the claim for the "war risk" insurance premia, Jiangsu submitted documentation from Air China dated 6 September 2000 which indicates that the premium for "war risk" insurance. As evidence of payment, Jiangsu submitted confirmation documentation from Air China. The Panel recommends compensation for "war risk" insurance in the amount of USD 352,000, being the amount claimed.

(h) Expenses in China

98. Jiangsu seeks compensation for the costs it asserts that it incurred in China for accommodating the workers and transporting them to their homes in China.

99. Under the terms of the various contracts that were submitted by Jiangsu, the responsibility for the cost of transporting workers from China to Kuwait was the responsibility of Jiangsu. In certain instances, the contracts specify which party bore responsibility for the costs in China (where specified, Jiangsu was responsible). In other instances the contract is silent on this issue. Jiangsu confirmed that it would ordinarily bear the costs of workers in China, as one would expect.

100. In order to establish its loss, Jiangsu submitted various invoices and receipts. Jiangsu did not submit evidence which demonstrated that this was an extraordinary expense. It would appear that it was the type of expense that it would ordinarily incur upon the commencement or cessation of a contract. Jiangsu confirmed that it ordinarily would bear the cost of the workers in China.

101. The Panel recommends no compensation as Jiangsu did not demonstrate that the asserted losses were the direct result of Iraq's invasion and occupation of Kuwait.

E. Financial losses

102. Jiangsu seeks compensation in the amount of USD 2,064,356 for financial losses. This claim, Jiangsu asserts, arises out of the interest on loans that Jiangsu was obliged to repay after Iraq's invasion and occupation of Kuwait. A loan was raised by Jiangsu from the Bank of China in January 1990. The capital amount of the loan was USD 15 million. The period for repayment was three years and attracted an annual interest rate of 6 per cent. The loan was designated "as the working funds for projects contracted in Iraq or Kuwait".

103. The calculation of the interest element appears to be based upon a portion of Jiangsu's capital claim to the Commission which leads the Panel to conclude that this is a claim for interest. The amount of USD 11,339,802.88 upon which it bases its claim consists of the total amounts claimed for contract losses, loss of tangible property, payment or relief to others, withdrawal costs and airfare.

104. The Panel, therefore, reclassifies this claim as a claim for interest. For reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Jiangsu's claim for interest.

F. Claim preparation costs

105. Jiangsu seeks compensation for claim preparation costs of USD 197,922. Applying the approach taken with respect to claim preparation costs set out in paragraph 60 of the Summary, the Panel makes no recommendation with respect to claim preparation costs.

G. Summary of recommended compensation for Jiangsu

Table 10. Recommended compensation for Jiangsu

Claim element	Claim amount (USD)	Recommended Compensation (USD)
Contract losses	6,398,194	1,003,384
Loss of profits	695,453	Nil
Loss of tangible property	446,775	51,655
Payment or relief to others	3,772,443	1,925,647
Financial losses	2,064,356	- -
Claim preparation costs	197,992	- -
Total	13,575,213	2,980,686

106. Based on its findings regarding Jiangsu's claim, the Panel recommends compensation in the amount of USD 2,980,686. The Panel finds the date of loss to be 2 August 1990.

IV. CHINA ZHEJIANG CORPORATION FOR INTERNATIONAL ECONOMIC AND TECHNICAL CO-OPERATION

107. China Zhejiang Corporation for International Economic and Technical Co-operation ("Zhejiang") is a Chinese state-owned entity involved in various types of engineering projects, including labour supply. Zhejiang established a branch office in Kuwait in February 1987. It was undertaking five contracts in Kuwait at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990. Zhejiang states that due to the effects of the invasion and occupation, it had to cease its commercial activities and withdraw its staff from Kuwait on 20 August 1990. Zhejiang seeks compensation in the total amount of USD 16,678,917 for asserted losses relating to contract, loss of profits, loss of tangible property, payment or relief to others, other losses and "accrued capital interest".

108. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Zhejiang's claim for interest.

Table 11. Zhejiang's claim

Claim element	Claim amount (USD)
Contract losses	7,729,346
Loss of profits	120,571
Loss of tangible property	3,533,192
Payment or relief to others	343,746
Interest	4,539,992
Other losses	412,070
Total	16,678,917

A. Contract losses

1. Facts and contentions

109. Zhejiang seeks compensation for contract losses in the total amount of USD 7,729,346 arising out of the following contracts as outlined in table 12, infra.

Table 12. Zhejiang's claim for contract losses

Contract	Employer	Main contractor	Subcontractor	Subsubcontractor	Claim amount (USD)
Contract number one	National Housing Authority of Kuwait ("NHA")	Khalifa Daij El-Dabbous ("Dabbous")	China Non Ferrous Metal Industry Foreign Engineering and Construction Corporation ("China Non Ferrous")	Zhejiang	6,489,500
Contract number two	NHA	Talal Al-Ghanim and Partners Co. ("TAGCO")	China International Water and Electric Corporation ("CWE")	Zhejiang	1,100,000
Contract number three	Not indicated	Sahara Al-Kuwait & Contracting Co. ("Sahara")	Zhejiang		114,572
Contract Number four	Not indicated	Al-Bahar Construction Co. ("Al-Bahar")	Zhejiang		9,582
Contract Number five	Not indicated	Al-Bahar	Zhejiang		15,692
Total					7,729,346

110. Included in Zhejiang's claim for contract losses were claims for "accrued capital interest". The Panel classifies the claims for "accrued capital interest" as a claim for interest. Zhejiang also sought compensation for amounts relating to expected future profits. These claims have been reclassified by the Panel as loss of profits claims.

2. Analysis and valuation

111. In support of its claim, Zhejiang submitted copies of the contracts. Zhejiang did not submit applications for payment, approved payment certificates, interim certificates, progress reports, account invoices and actual payments received or any other evidence to support the allegations concerning the amount of work completed and remaining. It stated that these documents were "looted" by the Iraqis as Zhejiang attempted to take them across the border into Iraq from Kuwait. The Panel finds that Zhejiang did not meet the evidentiary standards set out in paragraphs 30 to 34 of the Summary.

112. Zhejiang did not submit any evidence which demonstrated that the loss was caused directly by Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for the claims for asserted contract losses as Zhejiang did not submit sufficient evidence to support its claimed losses.

3. Recommendation

113. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

114. Zhejiang seeks compensation in the amount of USD 120,571 for loss of profits.

115. Zhejiang seeks compensation in the amount of USD 52,445.00 and USD 68,126 relating to expected future profits arising out of the two contracts that it had with Al Bahar (contract number four and contract number five respectively). Zhejiang bases its loss of profits claim on the value of the unexecuted portion of the contract. It then asserts a loss of profits claim of 25 per cent of this amount.

2. Analysis and valuation

116. In support of its claim, Zhejiang submitted balance sheets for the period 1986-1989. It did not, however, submit evidence of the profitability of the projects. Such evidence is to be found in the following: audited financial statements, budgets, management accounts, turnover, original bids, profit/loss statements, finance costs and head office costs prepared by or on behalf of the Zhejiang for each accounting period commencing in year one of the project and continuing through March 1993.

117. The loss of profit is claimed over the unexpired period of the contract. Evidence that demonstrated that the projects had proceeded or were proceeding as planned was not submitted. Such evidence might be found in monthly/periodic reports, planned/actual time schedules, interim certificates or account invoices, details of work that was completed but not invoiced by Zhejiang, details of payments made by the employer and evidence of retention amounts that were recovered by Zhejiang. Such evidence was not submitted. Zhejiang states that it was unable to resume the contracts upon the cessation of hostilities, but it did not explain why.

118. The Panel finds that Zhejiang failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation.

3. Recommendation

119. The Panel recommends no compensation for loss of profits.

C. Loss of tangible property

1. Facts and contentions

120. Zhejiang seeks compensation in the amount of USD 3,533,192 for loss of tangible property. The tangible property claim relates to contract number one. Dabbous had secured the main contract with the National Housing Authority of Kuwait and entered into a subcontract with China Non Ferrous. On 7 April 1987, China Non Ferrous, in turn, entered into a contract with Zhejiang relating to the project. The contract value was KWD 11,948,260 and the contractual agreement was to execute, complete and maintain civil, mechanical and electrical works for 300 houses.

121. China Non Ferrous' agreement with Zhejiang provided that the project would be "executed completely" by Zhejiang but in the name of China Non Ferrous. It is Zhejiang's contention that in order to complete the contract it built a "large sized" warehouse. The warehouse was located in the Qurain Area in Kuwait. This warehouse was used for the storage of engineering materials and as a distribution centre for construction machinery. Zhejiang's site office was also located in this area, as well as a camp accommodating 850 personnel.

122. Zhejiang states that when Iraq invaded Kuwait on 2 August 1990, its construction sites, warehouse, and its branch office in Kuwait were controlled and occupied by the Iraqi army. It withdrew its personnel from the various construction sites and subsequently evacuated its personnel from Kuwait on 20 August 1990. Upon the withdrawal of its personnel, Zhejiang states that it had to abandon its tangible property in Kuwait.

123. On 11 July 1991, it dispatched a three-member group to Kuwait who discovered that their tangible property had been "robbed" or destroyed during Iraq's invasion and occupation of Kuwait. Zhejiang summarises its tangible property loss as follows:

Table 13. Zhejiang's claim for loss of tangible property

	Claim item	Claim amount (USD)
1	Engineering materials in storage	2,021,387
2	Construction machinery and equipment	714,951
3	Site office facilities and camp facilities	638,804
4	Office facilities and living facilities of branch office	158,050
	Total	3,533,192

124. Zhejiang had also included, as part of its loss of tangible property claim, an amount of USD 1,365,432 which it described as "capital interest". The Panel reclassifies the claim for "capital interest" as a claim for interest.

2. Analysis and valuation

125. With respect to the claim for losses relating to "engineering materials in storage", Zhejiang submitted photocopies of photographs of the site and a list, produced by it, of the asserted materials in storage. However, neither the photographs nor the lists constitute evidence of the actual claimed loss. Accordingly, the Panel recommends no compensation.

126. Zhejiang submitted cash invoices and invoices to establish its ownership of the tangible property. It also submitted an agreement dated 18 August 1990 which it signed with "Arab Dawn Trading Co." This agreement related to equipment which Arab Dawn Trading Co. was to store. There is evidence submitted which demonstrates that Zhejiang's staff departed Kuwait during Iraq's invasion and occupation of Kuwait. The Panel finds that Zhejiang submitted sufficient evidence to demonstrate a loss relating to certain items entrusted with Arab Dawn Trading Co. Accordingly, the

Panel recommends the following amounts for award taking into account a suitable amount for depreciation:

Table 14. Zhejiang's claim for loss of tangible property - Panel's recommendation

	Claim element	Recommended compensation (USD)
1	Construction machinery and equipment	297,138
2	Site office facilities and camp facilities	17,128
3	Office facilities and living facilities of branch office	99,114
	Total	413,380

3. Recommendation

127. The Panel recommends compensation of USD 413,380 for tangible property loss.

D. Payment or relief to others

1. Facts and contentions

128. Zhejiang seeks compensation in the amount of USD 343,746 for payment or relief to others. The claim is for the cost of maintaining and evacuating 69 of its staff members from Kuwait.

129. Zhejiang indicates that during Iraq's invasion and occupation of Kuwait, shops closed down and materials were in short supply. Food, fuel and water were purchased by its branch office at "extreme high prices". Zhejiang states that it evacuated its staff from Kuwait on 20 August 1990 as their safety was under threat. Zhejiang stated that they travelled from Kuwait, via Baghdad to Amman. According to Zhejiang, this 1,800 kilometre journey took 57 hours to complete. It had to purchase food, water and "travel outfits" during the course of the journey. Zhejiang transported its personnel by air from Amman on 27 August 1990 to Shanghai, China. Zhejiang's costs are detailed in table 15, infra:

Table 15. Zhejiang's claim for payment or relief to others

	Claim item	Amount claimed (USD)
a	Guarantee for living and safety	131,100
b	Materials purchased during withdrawal	24,690
c	Air tickets and insurance premia	84,456
d	Medicals in China	69,000
e	Urgent settlement fee (USD 500 per person)	34,500
	Total	343,746

130. Zhejiang did not explain the nature of the various items claimed. It merely listed the loss element and the amount claimed. By way of explanation, in its response to the article 34 notification, Zhejiang refers to a copy of its standard form contract for its workers. This contract relates to the project for 300 houses in Kuwait.

131. Clause 2 provides that Zhejiang was "responsible to go through the exit formalities, including the passport, medical check-up and return air ticket". It is not clear whether the medical check ups referred to were to be conducted upon arrival, departure or both. The contract also deals with the situation of early termination of the contract through no fault of the employee. Clause 5 provides:

132. "During the contracted period, if the party B returns back to China before the due date, that means he works in Kuwait less than two years, but the reasons for this is not caused by the Party B. The party A should pay 60% of the hourly wages of to the party B, that is, USD 11,07 per day, equal to CNY 58,34 per day as the compensation."

133. Zhejiang had also included, as part of its payment or relief to others claim, an amount of USD 132,844 which it described as "capital interest". The Panel reclassifies the claim for "capital interest" as a claim for interest.

2. Analysis and valuation

134. Zhejiang submitted a receipt in Chinese dated 13 September 1990 issued by Air China. The receipt appears to be for air tickets and war risk insurance. A schedule of names relating to "lump sum fee for 69 personnel" and "payment for urgent settlement of 69 personnel" was also submitted. A schedule of expenses incurred between 2 and 27 August 1990 has been submitted along with receipts from "The Centre for Frozen Meatstuffs".

(a) Guarantee for living and safety

135. This claim is supported by receipts for food. The Panel finds that the claim is compensable in principle, to the extent that Zhejiang can establish proof of payment. The Panel finds that Zhejiang submitted sufficient evidence to establish that it incurred costs of USD 131,100.

(b) Materials purchased during withdrawal

136. In the absence of an explanation and evidence as to what this claim is for, the Panel recommends no compensation.

(c) Air tickets and insurance premia

137. According to the terms of the five contracts submitted, Zhejiang was responsible for the costs of transporting its employees by air from China to Kuwait and back. Zhejiang did not demonstrate how the costs, for the air tickets, claimed exceeded the costs it would ordinarily have incurred. With respect to the claim for the war risk insurance premia, the Panel finds that this is an extraordinary cost and compensable in principle. From the evidence submitted by Zhejiang, the Panel calculates the war risk insurance premia to be USD 24,702 and recommends compensation in this amount.

(d) Medicals in China

138. The Panel recommends no compensation for this item as Zhejiang did not submit evidence for the basis of the expenses and how they were directly caused by Iraq's invasion and occupation of Kuwait.

(e) Urgent settlement fee

139. The Panel finds that the fee is based on the obligations of Zhejiang to its employees arising out of a specific contractual obligation that they would be required to compensate their employees if the contract terminated earlier than it had contracted for. The Panel recommends compensation in the amount of CNY 181,815 (USD 38,504) as Zhejiang submitted sufficient evidence to establish that this loss resulted directly from Iraq's invasion and occupation of Kuwait and proof of payment.

3. Recommendation

140. The Panel recommends compensation in the amount of USD 194,206 for payment or relief to others.

E. Other losses

1. Facts and contentions

141. Zhejiang seeks compensation in the amount of USD 412,070 for other losses. The claim is for "post-war rescuing expenses".

142. These expenses, assert Zhejiang, relate to "actions to avoid and lesson the business of loss resulting from Iraqi unlawful invasion of Kuwait and lawful & judicial actions such as claiming

compensation for losses in accordance with laws." The claim appears to be a combination of mitigation costs and claim preparation costs.

143. Zhejiang has included a claim under this loss element for accrued capital interest of USD 17,857. The Panel reclassifies the claim for "capital interest" as a claim for interest and not "post war rescuing expenses".

144. Zhejiang states that it dispatched three members of its staff to Kuwait on 21 July 1991 to investigate the loss of its property in Kuwait. The costs which Zhejiang asserts that this group incurred are salaries of the personnel and office expenses totalling USD 44,242. Zhejiang also claimed for travelling expenses amounting to USD 40,790.

145. Zhejiang seeks compensation for the costs of a lawyer's expenses. These are calculated on the basis of 0.5% per cent of the claimed amount. The total amount claimed for the lawyer's expenses are USD 327,038. The Panel classifies this claim as a claim for claim preparation costs.

2. Analysis and valuation

146. As evidence for its salaries and office expenses, Zhejiang submitted an internal document from its Planning and Accounting Department dated 30 April 1993. A similar document is submitted as proof of the travel expenses. In support of the travel claim, Zhejiang submitted supplementary documentation on 26 September 2000 consisting of two untranslated documents in which the selected figures appear but their significance is not explained and a receipt.

147. In its supplementary documentation submitted on 26 September 2000, Zhejiang included a hotel receipt dated 13 August 1991. Zhejiang did not submit evidence of actual work done by the three staff members. Furthermore, there is no proof of payment of the salaries of the three staff members. With respect to the claim for office expenses, salaries and travel costs, the Panel recommends no compensation as Zhejiang did not submit sufficient evidence of the work done and proof of payment of the salaries.

148. With respect to the claim for the claim preparation costs, Zhejiang submitted a copy of an agency agreement entered into with a lawyer. Applying the approach taken with respect to claim preparation costs set out in paragraph 60 of the Summary, the Panel makes no recommendation for claim preparation costs.

3. Recommendation

149. The Panel recommends no compensation for other losses.

F. Summary of recommended compensation for Zhejiang

Table 16. Recommended compensation for Zhejiang

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	7,729,346	nil
Loss of profits	120,571	nil
Loss of tangible property	3,533,192	413,380
Payment or relief to others	343,746	194,206
Interest	4,539,992	- -
Other losses	412,070	nil
Total	16,678,917	607,586

150. Based on its findings regarding Zhejiang's claim, the Panel recommends compensation in the amount of USD 607,586. The Panel finds the date of loss to be 2 August 1990.

V. LAVCEVIC D.D.

151. LAVCEVIC d.d. ("Lavcevic") is a Croatian registered joint stock company. It seeks compensation in the total amount of USD 57,819,374 for asserted contract losses, loss of profit, loss of tangible property, financial iosses, payment or relief to others and interest, as follows:

Table 17. Lavcevic's claim

Claim element	Claim amount (USD)
Contract losses	36,923,526
Loss of profits	1,918,036
Loss of tangible property	11,830,525
Payment or relief to others	212,520
Financial losses	2,249,896
Interest	4,684,871
Total	57,819,374

152. Lavcevic claims USD 4,684,871 for interest. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to this claim.

153. All of the losses alleged arise out of Lavcevic's work on three construction/engineering projects in Iraq. The contractual arrangements for each of the projects were similar, and were consistent with contracting practices that prevailed in the former Yugoslavia as of 2 August 1990.

154. Pursuant to these practices, the Federal Directorate of Supply and Procurement of the former Yugoslavia ("FDSP") entered into project contracts with the relevant Iraqi entity. FDSP then entered into arrangements with local contractors in the former Yugoslavia. Under these arrangements, the local contractor undertook the responsibility for its designated portion of the contract between FDSP and the Iraqi authority and became entitled to the benefits of that portion of the contract subject to FDSP's commission. Lavcevic was one of the local contractors retained by FDSP for each of the following three contracts:

(a) Ministry of Defence, Directorate of Military Works, ("Contract 1100");

(b) Ministry of Defence, Directorate of Airforce and Air Defence Works (AFADW) ("Contract 202B"); and

(c) Ministry of Defence, Directorate of Naval Force Works, (DNFW) ("Contract 6103").

A. Contract losses

155. Lavcevic seeks compensation in the amount of USD 36,923,526 for contract losses.

Table 18. Lavcevic's claim for contract losses

Contract	Value of contract	Claimed amount
Project P-1101/3	183,572,549	32,726,348
202B	688,776,630	4,197,650
6103	750,000	5,528
Total	873,099,179	36,929,526

(a) Project P-1101/3

156. On 5 April 1981, FDSP and the Ministry of Defence, Iraq, Directorate General of Military Works, entered into a contract for the design and construction of three military bases in Iraq (the "main Contract 1100"). The total contract price was USD 1,101,435,279. 20 per cent of the contract price (USD 220,287,059) was to be paid to FDSP's bank in the former Yugoslavia within 15 days of the receipt of guarantees required under the main contract 1100. This was by way of an advance payment. The balance of 80 per cent of the contract price was payable in instalments. 81.25 per cent of such instalments were to be in United States dollars and the remaining 18.75 per cent in Iraqi dinars.

157. In order to carry out the main Contract 1100, FDSP entered into a subsidiary contract (the "FDSP contract") in July 1981 with four entities: KMG Trudbenik ("Trudbenik"), GRO Ratko Mitrovic ("Ratko Mitrovic"), Lavcevic, and Working Organisation for Civil Engineering ("Primorje"). Under the terms of the FDSP contract, the work for the main Contract 1100 was apportioned between the four entities. FDSP charged a commission of 2.17 per cent for its role as a "commissioner and general contractor". The FDSP contract refers to the main contract and provides that the four entities "agree to realize the Project 1100 all in accordance with the provisions of the contract concluded with the client".

158. The military bases were located at Al Kazak (Project P-1101/3); Baladrooz (Project P-1102), and Numaniya (Project P-1103). The works at Al-Kazak base were allocated to Lavcevic and Primorje in equal shares. And the main Contract 1100 provided for the works to be completed in 38 months. This original period was extended. In its reply to the article 34 notification, Lavcevic submitted an annex to the main Contract 1100 dated 6 July 1990. This document is signed by FDSP and the Ministry of Defence, Iraq, and extends the completion date for the main contract 1100 to 1 December 1991.

159. Lavcevic's asserts that it was to carry out work to the value of USD 183,572,549. This amount was subsequently reduced to USD 147,746,830.

160. Lavcevic states that the mechanism for payment was not solely regulated by the contractual terms entered into between FDSP and Iraq, but also by the terms of instruments agreed between the Governments. Lavcevic distinguishes two periods of time for payment purposes. The first relates to the period up to and including 1983 and the second relates to the period after 1983.

161. During the period up to 1983, Lavcevic states that the payments were made according to the terms of the contract provisions. Individual instalments were payable upon presentation by Lavcevic of its statement of costs and completed work followed by verification by Iraq. Iraq made the payments for completed work into FDSP's account with the National Bank of Yugoslavia. FDSP, after deducting its commission and the cost of bank guarantees, would then forward the relevant payment to Lavcevic.

162. For the period after 1983, an agreement between the Governments of Iraq and the former Yugoslavia entered into on 18 October 1983 resulted in deferred payment arrangements and with payments mainly resulting from crude oil deliveries.

163. Lavcevic asserts that, as a result of Iraq's invasion and occupation of Kuwait, work on Contract 1101 was suspended, and that consequently, Lavcevic suffered contract losses as discussed in the following paragraphs.

(i) "Unsettled payments for executed works"

164. Lavcevic seeks compensation in the amount of USD 18,758,514 for "unsettled payments for executed works" - essentially, work done but not paid for. Lavcevic states that it had completed work to the value of USD 115,797,560 as of the date of suspension of the works. The evidence submitted by Lavcevic in support of this element of its claim indicates that the Iraqi employer had acknowledged USD 105,184,341 as the value of completed work in a certificate dated 30 April 1990. Lavcevic asserts that it had executed work to the value of USD 10,613,219 from 30 April 1990 until the suspension of Project P-1101/3 on 29 September 1990. It is Lavcevic's contention that of the asserted executed works valued at USD 115,797,560 it only received payments totalling USD 97,039,045. Compensation is sought for the difference.

165. In support of its claim, Lavcevic submitted a copy of both the main Contract 1100 and the FDSP contract. With respect to the work completed up to 30 April 1990, Lavcevic submitted a document entitled "Monthly Account for the works Performed by the Contractor in the period till 30/4/90." It also submitted other documentation to demonstrate the work done and materials delivered to the site up until 30 April 1990.

166. The Panel calculates that the portion of Lavcevic's claim relating to the period up to 30 April 1990 totals USD 8,145,295. The Panel finds that this element of Lavcevic's claim relates to work that was performed prior to 2 May 1990. Applying the approach taken with the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel recommends no compensation for this amount.

167. With respect to the claim relating to work performed in the period from 2 May to 29 September 1990, Lavcevic relies on a letter dated 16 June 1992 sent by Lavcevic and FDSP to the Iraqi employer to confirm the value of completed work up to 30 September 1990. In the letter the parties seek to confirm the value of the completed work up to 30 September 1990, and state that the value was USD 112,644,347. This differs from the information submitted by Lavcevic to the Commission where it stated that the value of the completed work was USD 115,797,560.

168. Lavcevic also refers to a letter from the resident engineer dated 17 June 1992 which, it states, confirms "receipt of our letter with comments". The letter being referred to is that of 16 June 1992 referred to in paragraph 167 supra. The response of the employer, if anything, detracts from Lavcevic's assertions as to the quantity of work completed. The employer states:

> "With reference to the percentage of executed works for substages we have to point out that this percentage can be used neither for Monthly Account nor for the Payment. The percentage for substage 12.1 is cancelled because it depends upon the executed buildings and it cannot be considered out of this lists."

169. The article 34 notification sent to Lavcevic sought an explanation as to why there was apparently no valuation of the works from the end of April to 29 September 1990. Lavcevic responded that "the measurement books signed by the contractor and the employer have been left on the site..." In addition to the problems created by this letter, dated 17 June 1992 referred to in paragraph 168, supra and by the fact that there is no clear explanation of the scheme of payment in the papers, the Panel notes that payments were made in late 1990 and in 1991, after the liberation of Kuwait. These payments are not allocated to the work. These factors make calculation of an actual loss impossible.

170. The Panel finds that, with respect to the work performed up to 29 September 1990, Lavcevic did not submit sufficient evidence to substantiate when the work was performed, the quantity of work performed or the value of the work performed. Such evidence could have included, for example, detailed applications for payment, approved payment certificates, interim certificates, progress reports, account invoices or evidence of actual payments received. Accordingly, the Panel is unable to recommend compensation.

(ii) "Specially manufactured equipment"

171. Lavcevic seeks compensation in the amount of USD 658,473 for "specially manufactured equipment". Lavcevic asserts that it ordered and paid for various materials and equipment in order to execute the contract. It is the contention of Lavcevic that according to the terms of clause 67.7.B. of the main Contract 1100, the Iraqi employer was required to pay it for these items if the contract was terminated due to "war".

172. In support of its claim, Lavcevic submitted various invoices and partly translated documents. In the article 34 notification, Lavcevic was requested to submit evidence to demonstrate that it paid for the goods, proof of delivery and an explanation of what had become of the goods in question.

Lavcevic did not submit any of the requested information. Lavcevic stated in its reply to the article 34 notification that it was awaiting information from its suppliers. According to Lavcevic, some of the material is stored in Croatia and in a warehouse in Bosnia-Herzegovina; however, it submitted no proof in support of these contentions. Lavcevic states that when the trade embargo against Iraq is over, it is likely that the goods will be shipped to Iraq.

173. The Panel recommends no compensation on the basis that Lavcevic did not submit sufficient proof of payment for, or of delivery of, the goods, nor did it provide an explanation of what has become of the goods.

(iii) "Taxes and dues"

174. Lavcevic seeks compensation in the amount of USD 1,568,822 for costs incurred for what appears to be taxes on truck transportation and registration of temporary imported vehicles. It asserts that according to the terms of clauses 26.3 and 26.4 of the main Contract 1100, the Iraqi employer was responsible for compensating Lavcevic for these costs. In support of its claim, Lavcevic submitted a schedule of taxes and dues and various untranslated sample documents (Lavcevic states that because of the immense amount of receipts which are, in Arabic, it is only able to provide samples).

175. Lavcevic asserts that clause 26 of the General Conditions to the main Contract 1100 exempts it from all taxes levied in Iraq. This assertion is based on clause 26.3, which provides that any taxes payable on truck transportation of goods destined for Iraq will be "defrayed" by the employer, and clause 26.4, which stipulates that any tax payable for registration of vehicles imported on a temporary basis will also be "defrayed" by the employer.

176. A review of the contract reveals that it is silent as to when such reimbursements were to be made by the employer. However, the schedule submitted by Lavcevic reflects payments that arose between 1985 and 30 April 1990. The Panel finds that the claim for taxes and dues relates to obligations of Iraq that arose prior to 2 May 1990. Accordingly the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

(iv) "Undepreciated value of precast elements factory and camp and undepreciated value of temporary works"

177. Lavcevic seeks compensation in the amount of USD 8,449,149 for amounts allegedly owed to it by the Iraqi employer relating to the undepreciated value of the precast factory (USD 4,366,080), the camp (USD 1,884,542), and the temporary labour works (USD 2,198,527).

178. Lavcevic relies on the "Special Risks" provision of the main contract 1100, contained in clause 67 of the General Conditions of the main Contract 1100, in support of its claim for compensation for each element of this portion of the claim. With respect to the precast factory and camp, Lavcevic first refers to article 32.7 of the main contract, which provides that:

> "the contractor shall have the right to be paid full value of site camps and prefabrication Plants and other materials approved by the employer in such a case the Contract is terminated due to Special Risks."

179. The "Special Risks" provision is contained in clause 67 of the General Conditions of the main Contract 1100. Clause 67.5 refers to the outbreak of war, the termination of the contracts, and the requirements for such a termination. Clause 67.7 stipulates that if the contract is terminated pursuant to the terms of clause 67.5, then the employer is required to pay the contractor for all works executed prior to the date of termination at the rates provided for in the contract. This clause, however, stipulates that the contractor shall be paid "insofar as such amounts or items shall not have already been covered by payments on account made to the contractor" (emphasis added).

180. The issue that arises in relation to this portion of the claim is whether Lavcevic has indeed been compensated for these amounts over the period of the contract. The difficulty in resolving this issue is first one of timing and second one of accounting. The main contract was signed in April 1981. During the period since that date Lavcevic may have received these payments in respect of the work that is the subject of this claim. In addition, it is not even apparent from the documentation submitted as to when the temporary works and camp were built. The figures upon which the calculations are based have not been submitted nor has the basis of arriving at a particular method of calculation been identified.

181. In the absence of evidence indicating the exact dates when performance was rendered, the Panel is unable to ascertain which amounts, if any, are properly within the jurisdiction of the Commission. The Panel recommends no compensation as Lavcevic did not submit sufficient evidence to establish that its claim is within the jurisdiction of the Commission, it did not submit evidence that demonstrates a loss, and the evidence that was submitted does not establish how the losses alleged arose as a direct result of Iraq's invasion and occupation of Kuwait.

(v) "Undepreciated fixed costs"

182. Lavcevic seeks compensation in the amount of USD 2,813,862 for undepreciated fixed costs allegedly incurred but not paid for. This claim consists of three elements: (a) "unpaid designs" (USD 1,355,499.58); (b) "temporary water and electricity" (USD 843,028.57); and (c) technical documentation (USD 615,333.33). Lavcevic asserts that pursuant to the special risks clause in the contract relating to "war" (67.7.c.), these costs would have been "redeemed" if the contract works had been continued and completed.

183. Lavcevic calculates the unpaid design works on the basis of two per cent of the unexecuted value of the contract (USD 67,774.989 X 2% = USD 1,355,499.58). For the costs relating to the temporary water and electricity supply, Lavcevic states that although this service was provided for by another company, Trudbenik and AS Group, under the main Contract 1100, Lavcevic's share of the main Contract 1100 amounted to one sixth, and that this represented its pro rata share of the cost incurred for this item on the project. The same method is used to arrive at the amount claimed for the

technical documentation. In support of its claim, Lavcevic submitted a summary of costs, and a copy of the contract between Trudbenik and AS Group dated 11 August 1981.

184. The Panel finds that Lavcevic did not fully explain the basis for this claim nor the calculations used. The claim also suffers from sufficient supporting documentation.

185. So far as the unpaid designs claim is concerned, there are a number of problems. These problems derive from the fact that Lavcevic has used a formulaic method to calculate its claim, rather than an evidential and analytical method to demonstrate an actual loss. First, Lavcevic has calculated the quantum by deducting the value of the work allegedly completed (USD 115,797,560) from a contract sum of USD 183,572,549. However, while it is correct that USD 183,572,549 was the original contract sum, it was reduced to USD 147,746,830. There is no explanation of why Lavcevic has used the original rather than the revised contract sum.

186. Second, the two per cent calculation is based on clause 19.7 of the main Contract 1100. That clause does indeed appear to be applicable to the present situation and to provide for reimbursement of design work by reference to a percentage. However, the precise wording of the clause is as follows:

> "In case of termination of the contract due to the special risks as detailed in the General Conditions – Clause 67 the design work done shall be separately paid in accordance with the Design Payment Schedule amounting to 2% of the total contract price. The schedule is to be enclosed to the contract Agreement as Enclosure No. 9".

187. Such a schedule is indeed to be found with the main Contract 1100 agreement. It provides for a series of 101 design payments, the total of which amounts to two per cent of the total contract price of USD 1,101,435,279. The schedule comprises individual sums. There is no material at all upon which the Panel can ascertain which sums were the responsibility of Lavcevic, let alone which sums were recovered by Lavcevic as part of the payments made to Lavcevic in the ten years between July 1981 and May 1991. Accordingly, the Panel has been unable to identify any loss in respect of this item of claim.

188. Similarly, a formulaic calculation has been put forward in respect of the claim for temporary water and electricity. No proof has been submitted of the charges that have been levied and the payments made to Trudbenik for these services. Lavcevic did submit copies of invoices as proof of payment to AS-Group. These, however, relate to 1982. This suggests that the claim element relates to debts or obligations of Iraq that arose prior to 2 August 1990.

189. The Panel recommends no compensation as Lavcevic did not submit sufficient evidence to establish that its claim was within the jurisdiction of the Commission, it did not submit evidence that demonstrates a loss, and, the evidence that was submitted did not establish how the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

(vi) Other costs arising from the suspension of the works

190. Lavcevic seeks compensation in the amount of USD 471,528 for what appear to be mitigation costs. These costs relate to conservation of the site, storage of inventory, documentation and "safekeeping" costs. The costs are outlined in the following paragraphs:

(a) Conservation of equipment

191. Lavcevic seeks alleged mitigation costs in the amount of USD 50,800 in respect of its buildings, equipment, machines and vehicles as set out in table 19, infra:

Table 19. Lavcevic's claim for contract losses (Project P-1101/3 - conservation costs of equipment)

Claim item	Claim amount (USD)
Skilled workers	
10 workers x 10 days x 9 hours x USD 12 per hour	10,800
Machines and vehicles	
Loader CAT 980,	
1 x 5 days x 9 hours x 102 USD per hour	4,590
Tipping truck	
2 x 10 days x 9 hours x 62 USD per hour	11,160
Tipping truck (8 tonnes)	
2 x 10 x 9 hours x 42 USD per hour	7,560
Fork lift truck	
1 x 5 days x 9 hour x 42 USD per hour	1,890
Conservation of machines and vehicles	
Skilled workers	
7 workers x 10 days x 9 hours x 14 USD	8,820
Oil, lubricants, naphtha	5,980
Total	50,800

192. Lavcevic calculated its costs on a time and material basis, but has not submitted any independent supporting evidence to confirm the costs. The date the work was carried out is not given but Lavcevic makes reference to FDSP letter GD/MU-941/RE dated 27 September 1990. In the letter FDSP confirms to the client that the Employer's representative on the site agreed to the manner of closing the buildings and closing the works.

193. The Panel is of the view that while some work may have been likely in closing down the project, it is not able to verify the charges. Accordingly, the Panel recommends no compensation.

(b) Rental fees for buildings and grounds

194. Lavcevic seeks compensation in the amount of USD 369,816 for rental fees on three properties. While it is not clear from the claim, this appears to be for the costs of rental relating to mitigation costs, i.e., to store goods.

195. The first rental fee for which compensation is claimed is for the "building and ground" in street No. 10, Mahala 915, House No. 18, Baghdad. The claim is for the period from 1 July 1990 to 30 April 1992. The total amount claimed is USD 174,622. The second rental fee is for the "building and ground" for a Mr Abdul Mahdi Daji Allawi totalling USD 169,733. This relates to the period from 1 April 1990 to 31 March 1992. The third rental fee is for the "building and ground" totalling USD 25,460 relating to subcontractor, "Monter". It is not clear whether it was an amount paid on behalf of Monter or to Monter.

196. In support of its claim for rental losses, Lavcevic submitted a schedule of calculation, a copy of a lease agreement dated 30 June 1990 for House No. 18 and a copy of a receipt for rent dated 17 May 1989. Lavcevic did not submit the lease agreements relating to the building of Mr. Allawi nor that relating to "Monter". In addition, a number of the receipts submitted are untranslated.

197. Lavcevic did not demonstrate that the losses relating to the rent were caused directly by Iraq's invasion and occupation of Kuwait. In fact, a number of the payments related to the period prior to 2 August 1990. The Panel, therefore, recommends no compensation for the claim for rent.

(c) Transportation and storage of inventory and documentation on site

198. Lavcevic seeks compensation in the amount of USD 26,468 for the costs of transporting and storing documentation from Contract 1101. It asserts that this documentation was transported from the project site at Al-Kazak to Baghdad, a distance of about 400 kilometres. The costs asserted include the costs for vehicles, labour and a mobile crane.

199. Lavcevic did not submit any independent evidence of the costs incurred or proof of payment. The Panel, therefore, recommends no compensation for the claim for transporting and storage.

(d) Costs of guarding house in Baghdad

200. Lavcevic seeks compensation in the amount of USD 24,444 for the costs of guarding the house in Baghdad where it stored items for safekeeping. It stated that it engaged an Iraqi citizen as a guard from 1 October 1990 to 30 March 1993. The monthly cost was IQD 200. The address of the house rented in Baghdad was House No. 18, street No. 20.

201. Lavcevic did not submit the copy of the receipt it references as substantiating the payments to the Iraqi citizen. Accordingly, the Panel recommends no compensation.

(e) Contract 202B

202. Lavcevic seeks compensation in the amount of USD 4,197,650 for contract losses allegedly incurred on Contract 202B.

203. On 19 December 1980, an agreement between the Directorate of Airforce and Air Defence Works, Ministry of Defence, Iraq, and FDSP was signed (the "main contract"). The agreement was for the construction, supply, erection and installation of an air base residential camp in Baghdad, Iraq. The total contract value was USD 688,777,630. According to the terms of the agreement, the contract was to be completed in "1461 (one thousand four hundred and sixty one) calendar days". FDSP entered into a second contract ("FDSP contract") with the following entities: "Granit"-Skopje, ("Granit"), Lavcevic, Sour Unioninvest ("Unioninvest") and Trbovlje-OOUR Aeroinzenjering ("Aeroinzenjering"). The date is not apparent from the copy of the contract supplied, but according to Lavcevic's statement of claim, the contract was entered into in 1980. An advance payment was payable within 15 days of receipt of the guarantees. An amount representing 25 per cent of the contract price (USD 169,311,527.56) was to be paid to FDSP's bank in the former Yugoslavia. The balance of 75 per cent of the contract price was payable in instalments.

204. According to Lavcevic, the project works were completed; however, it does not state the date of completion. It asserts that the total value of the completed work was USD 856,522,857. Of this amount Lavcevic stated that its share of the value of completed work totalled USD 117,206,599.53. Lavcevic asserts that it was paid USD 113,008,948.81. The amount outstanding to Lavcevic, and for which it seeks compensation, is asserted to be USD 4,197,650.72.

205. Lavcevic did not submit information, despite being requested to do so, detailing the dates when the work on the project was carried out. This is a significant omission as it makes it impossible for the Panel to determine, what amount, if any, of the work was carried out after 2 May 1990. The two final maintenance certificates dated 1 June 1992 do not disclose when the actual work was performed. The schedule of "Total Collection" submitted by Lavcevic reflects payment dates ranging from 3 November 1981 to 3 July 1991. The payment dates do not assist in determining the dates of performance.

206. The "Final Account Recapitulation" document suggests an overpayment of USD 574,260.49. Lavcevic was requested in the article 34 notification to explain how this affected the claim. In its reply to the article 34 notification, Lavcevic submitted a document described as "Tabular Review of Each Contractor's Credits (Debits)". Lavcevic states that this document demonstrates that it is owed USD 662,618. The document appears to be of limited probative value as it is not signed or verified by any of the parties (there is space on the document for the signature of the co-contractors but the document has not been signed).

207. The Panel recommends no compensation for this loss element as Lavcevic did not submit sufficient evidence and explanations to establish what portion of the claim, if any, related to work performed after 2 May 1990.

(f) "Contract 6103"

208. Lavcevic seeks compensation in the amount of USD 5,528 for contract losses allegedly occurred on Contract 6103.

209. On 17 April 1982 the FDSP and Iraqi Ministry of Defence, Directorate of Naval Works, signed a contract for site survey works in Basrah, Iraq. The contract value was USD 750,000. FDSP entered into a second contract with Lavcevic relating to the performance of Project 6103. The date of signature is unclear but Lavcevic states that the contract was entered into in 1982. On 17 August 1985, Lavcevic contracted for additional work valued at USD 55,000 for Project 6103. Lavcevic asserts that it completed all its obligations in terms of the agreement but was not paid an amount of USD 5,528.

210. Lavcevic submitted incomplete contract documentation. There are no payment terms disclosed in the portion of the contract submitted. In addition, the period for completion of the contract is not indicated. Further, Lavcevic did not indicate the dates of performance relating to the work under the contract. It is therefore impossible to determine what portion, if any, of the work was performed after 2 May 1990. Lavcevic did not provide evidence to establish its claim such as detailed applications for payment, approved payment certificates, interim certificates, progress reports, account invoices or evidence of actual payments received.

211. The Panel recommends no compensation for this loss element as Lavcevic did not submit sufficient evidence and explanations to support its claim or to establish what portion of the claim, if any, related to work performed after 2 May 1990.

B. Loss of profits

212. Lavcevic seeks compensation in the amount of USD 1,918,036 for loss of profits arising out of Contract 1101. This claim was originally submitted as a claim for contract losses. The Panel has reclassified it as a loss of profits claim.

213. Lavcevic's contention is that had there been no suspension of the work on Contract 1101, Lavcevic would have continued work under the contract until its completion. Lavcevic calculates its loss of profits as 6 per cent of the value of the unexecuted works for Project P-1101/3. Lavcevic asserts that for contracts of this nature the profit margin was 10 per cent and bases the amount of 6 per cent on the "maximum amount of penalties" relating to collection of the advance by the employer. The value of the unexecuted portion of the contract is asserted as USD 31,967,270.

214. Lavcevic did not submit supporting evidence for its asserted loss of profits such as, for example, audited financial statements, budgets, management accounts, turnover, original bids, profit/loss statements, finance costs and head office costs prepared by or on behalf of Lavcevic for each accounting period commencing in year one of the project and continuing through March 1993. Indeed, as noted earlier, Lavcevic failed to establish the value of the unexecuted portion of the contract.

215. The Panel finds that Lavcevic failed to fulfil the evidentiary standard for loss of profits claims as set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation.

C. Loss of tangible property

1. Facts and contentions

216. Lavcevic seeks compensation in the amount of USD 11,830,525 for loss of tangible property. Lavcevic asserts three categories of tangible property allegedly lost: "production material and equipment (permanent import)"; "machinery, tools and other temporary imported property"; and "demolished property". These are examined in turn.

(a) Production material and equipment (permanent import)

217. Lavcevic seeks compensation of USD 5,220,114 relating to production material on the construction site in Iraq. This material was to be consumed in the production process, that is, included in the buildings. Lavcevic states that it prepared a list of these materials on 27 September 1990, which was handed to the resident engineer. According to the statement of claim of Lavcevic:

> "All the aforementioned property we consider as expropriated, for which till today we haven't received any compensation. Expropriation of the property was confirmed by the Iraqi Government in 1992". (Emphasis added).

218. Lavcevic also submitted photographs of the property. These photographs were taken in June 1992 and Lavcevic states that included in the photographs are "officers of government, organisation FAO who confiscated on P-1101 the property of the companies Lavcevic . . .". Lavcevic refers to a protocol relating to the confiscation which it states is 3,000 pages long and is in Arabic. This document, however, was not submitted by Lavcevic.

(b) Machinery, tools and other temporary imported property

219. Lavcevic seeks compensation of USD 6,481,434 relating to machinery that it had imported into Iraq on a temporary basis. It stated that upon withdrawing from the site it left behind this equipment. Lavcevic states that it informed the resident engineer by letter on 27 September 1990 of the equipment left behind.

220. Lavcevic indicated that it did eventually obtain approval to export the equipment but that this approval was subsequently revoked by the Government of Iraq. While it is not clear, this revocation appears to be referenced in the letter from a customs broker, Fehmi S. Sywash, dated 6 April 1992. The letter is addressed to FDSP in Baghdad and in the opening paragraph refers to "temporary imported machines, equipment and vehicles, considering its re-export or remaining in the country." The letter quotes a text from the Instructions of Council of Ministers No. 712/2, and states that:

> "The President Saddam Hussein ordered that the Commission from Administration for Military Production and state body – contractor with the company take all the machines, equipment and vehicles appertaining to the foreign companies which left the country."

221. There is no indication as to what exactly happened to this property. It is categorised by Lavcevic under the heading "Expropriated Property".

(c) "Demolished property"

222. Lavcevic seeks compensation in the amount of USD 128,977 for "demolished property". The claim is for food left in the refrigerator upon the departure of its staff from Iraq. Lavcevic indicates that "[w]e presume that aforementioned food deteriorated regarding that there was no one to maintain properly electrical installations."

2. Analysis and valuation

223. Lavcevic submitted, with respect to its tangible property claim for loss of production material and equipment (permanent import), a large volume of documentation. Notwithstanding this, the Panel is unable to verify the material that was on site as at 2 August 1990. The dates on the supporting documents go back to the years before 1990 and is not possible to verify that the quantities and rates are restricted to the materials that were on-site (un-fixed) as at 2 August 1990. This is a particularly important issue given that the items for which compensation is claimed are consumables.

224. With respect to the claim for machinery, tools and other temporary imported property, Lavcevic submitted purchase invoices, customs declarations and customs guarantees. Despite the substantial amounts of evidence and attempts to provide relevant information and supporting schedules, the location and presence on-site of the assets and equipment on 2 August 1990 is not established and the residual values of the equipment have not been substantiated. The percentage calculations used by Lavcevic are not verified.

225. Assuming that Lavcevic did indeed overcome the evidentiary burden relating to its claim for the permanently imported and temporarily imported property, the Panel concludes, from the evidence submitted, that this property was confiscated. Applying the approach taken with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait set out in paragraph 146 of the Summary, the Panel recommends no compensation.

226. With respect to the claim for foodstuff, Lavcevic submitted several invoices from Centrocoop and a statement from its site manager dated 1 October 1999 indicating the value of the food left in Iraq. The invoices are dated between 31 October 1989 and 2 July 1990. Lavcevic submitted a schedule from which the Panel could cross-check the items of food stuff with the invoices submitted by Lavcevic. The Panel finds that Lavcevic submitted sufficient evidence to demonstrate its loss of foodstuff and accordingly the Panel recommends compensation in the amount of USD 128,977.

3. Recommendation

227. The Panel recommends compensation in the amount of USD 128,977 for loss of tangible property.

D. Payment or relief to others

228. Lavcevic seeks compensation for USD 212,520 for evacuation costs. Lavcevic states that it had 88 employees in Iraq and it evacuated them during September 1990. The claim consists of the following:

Table 20. Lavcevic's claim for payment or relief to others (evacuation costs)

	Claim item	Claim amount (USD)
1	Transportation from project site, Al-Kasak, Iraq, to Split, Croatia	44,000
	88 persons USD 500 per person	
2	Travelling expenses daily allowances:	22,800
	88 persons USD 65 x 4 days	
3	Bed night costs:	7,920
	88 persons x USD 30 bed per night x 3 nights	
4	Salaries (while awaiting visas)	70,400
	88 persons x USD 80 per day x 10 days	
5	War danger allowance	67,320
	88 persons x USD 17 per day x 45 days	
	Total	212,520

229. Lavcevic submitted a schedule containing the family names, given names, dates of hire, job titles, passport numbers and identification numbers of 73 employees. It did not submit its payroll records for the employees for the period relevant to the claim (both before and after 2 August 1990). Lavcevic refers to contracts for each of its employees that it purported to attach, however these documents were not in fact attached.

230. Lavcevic did not submit invoices and receipts for the expenses incurred by it although this information was specifically requested in the article 34 notification sent to Lavcevic. This did not produce any further documentation. The complete absence of any supporting documentation is even more surprising since a substantial part of the claim covered transportation outside of Iraq and was allegedly effected by bodies which are also based outside Iraq, for example, Jugoslav Aero Transport

and Hidrogradnja as well as Lavcevic itself. The Panel recommends no compensation as Lavcevic did not submit sufficient evidence of its expenses.

E. Financial losses

231. Lavcevic seeks compensation in the amount of USD 2,249,896 for financial losses. The claim is for funds which it asserts were held in Rafidain Bank, Baghdad. According to Lavcevic, as a result of Iraq's invasion and occupation of Kuwait, it was unable to convert these funds to United States dollars. Lavcevic asserts that an amount of USD 694,708 stood to its credit in Rafidain Bank and this amount was linked to the main Contract 1100. The right to transfer these amounts, Lavcevic contends, was provided for in terms of clause 9.3 of the main Contract 1100. With respect to Contract 202B, Lavcevic states that the account at Rafidain Bank contained USD 1,555,188 in "unspent funds". Lavcevic asserts a right to transfer these amounts in terms of article 4.3 of Contract 202B.

232. In support of its claim, Lavcevic submitted a copy of an illegible bank statement (Project 1101/3), a copy of illegible bank statement (Project 202B), an extract from a contract and an unexplained invoice Number 4513, dated 27 April 1983.

233. Applying the approach taken with respect to loss of funds in bank accounts, set out in paragraphs 130 to 135 of the Summary, the Panel recommends no compensation.

F. Summary of recommended compensation for Lavcevic

Table 21. Recommended compensation for Lavcevic

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	36,923,526	nil
Loss of profits	1,918,036	nil
Loss of tangible property	11,830,525	nil
Payment or relief to others	212,520	128,977
Financial losses	2,249,896	nil
Interest	4,684,871	- -
Total	57,819,374	128,977

234. Based on its findings regarding Lavcevic's claim, the Panel recommends compensation in the amount of USD 128,977. The Panel finds the date of loss to be 2 August 1990.

VI. CONSTRUCTION SOCIAL COMPANY "PRIMORJE"

235. Construction Social Company "Primorje" ("Primorje") is a Croatian registered legal entity. At the time of Iraq's invasion and occupation of Kuwait on 2 August 1990, Primorje was engaged on a contract for the construction of a military base in Iraq. Primorje seeks compensation in the total amount of USD 25,070,347 for contract losses, loss of profits, and loss of real property and income producing property.

236. The Panel reclassified the claims for loss of real property and income producing property as a claim for loss of tangible property.

Table 22. Primorje's claim

Claim element	Claim amount (USD)
Contract losses	12,618,472
Loss of profits	1,557,262
Loss of tangible property	10,061,495
Payment or relief to others	833,118
Total	25,070,347

A. Contract losses

237. Primorje seeks compensation in the amount of USD 12,618,472 for contract losses.

238. In accordance with the practice prevailing in the former Yugoslavia as of 2 August 1990, the Federal Secretariat of National Defence, Federal Directorate of Supply and Procurement ("FDSP") entered into the project contracts with the relevant Iraqi entity. FDSP then entered into arrangements with local contractors in the former Yugoslavia. Under these arrangements, the local contractor undertook the whole responsibility of the contract between FDSP and the Iraqi authority and became entitled to the benefit.

239. On 5 April 1981, FDSP and the Iraqi Ministry of Defence, Directorate General of Military Works, entered into a contract for the design and construction of three military bases in Iraq (the "main contract"). The total contract price was USD 1,101,435,297. FDSP entered into a second contract (the "FDSP contract") in July 1981 with four entities: KMG Trudbenik ("Trudbenik"), GRO Ratko Mitrovic ("Ratko Mitrovic"), Ivan Lucic Lavcevic ("Lavcevic") and Primorje. According to the terms of the FDSP contract, the work for the main contract was apportioned between the four entities. The FDSP contract refers to the main contract and provides that the four entities to "agree to realize the Project 1100 in all parts of the contract which is concluded with the investor . . ."

240. The three military bases were located at Al-Kazak (Contract P-1101), Baladrooz (Contract P-1102), and Numaniya (Contract P-1103). Primorje and Lavcevic were to execute the Al-Kazak

project in equal shares. The period for completion was established in the main contract for Al-Kazak base as 38 months. In its reply to the article 34 notification, Primorje submitted an annex to the main contract dated 6 July 1990. This document is signed by FDSP and the Ministry of Defence, Iraq and seeks to extend the completion date for the main contract to 1 December 1991.

241. Primorje's portion of the work was for an asserted amount of USD 183,572,549. This amount was subsequently reduced, by agreement of the contracting parties, to USD 106,381,944. Primorje and Lavcevic entered into an agreement on 29 September 1981. The agreement related to the division of the work on the project between them. This agreement was amended on 28 April 1988 to reflect a reduction in the value of the works.

242. An advance payment was payable within 15 days of receipt of the guarantees. An amount representing 20 per cent of the contract price (USD 220,287,059) was to be paid to FDSP's bank in the former Yugoslavia. The balance of 80 per cent of the contract price was payable in instalments. A total of 81.25 per cent of such payments were to be denominated in United States dollars and the balance of 18.75 per cent in Iraqi dinars. The payment terms of the contract were amended by subsequent agreements between the Governments of the former Yugoslavia and Iraq. Primorje states that the Government of Iraq did not pay its liabilities relating to the contract and this resulted in further postponements of the due dates for payment.

243. Primorje states that the project experienced delays caused by a lack of documentation from the Iraqi employer and also technical problems relating to the ground work which required additional geological examination. Primorje indicates that it commenced the contract works for Project P-1101 on 3 October 1981. The contract work ceased on 29 September 1990 upon Primorje's evacuation of its staff from Iraq. It seeks compensation as outlined in the following paragraphs.

(a) Value of executed works

244. Primorje seeks compensation for the unpaid value of the executed works. Primorje indicates that up to the time of the suspension of the works on 29 September 1990, it had completed work to the value of USD 75,236,752.00. The Iraqi employer, in its certificate dated 30 April 1990, allegedly acknowledged an amount of USD 62,725,045.00. In the period from 30 April to 29 September 1990, Primorje asserts that it completed work to the value of USD 10,601,707.

245. As evidence to support its claim, Primorje submitted two untranslated "certificates" dated 31 August 1990 and 30 September 1990. With respect to the document relating to 31 August 1990, a figure of "75,236,752" is discernible. There is no other evidence submitted to indicate what work, if any, was performed during the period 2 May to 29 September 1990. Primorje acknowledges receiving an amount of USD 94,367,769 (including an advance payment of USD 36,714,510). The difference between the value of the executed works and the amount received is not explained.

246. With respect to Primorje's claim for the period up to 30 April 1990, the Panel finds that this element of Primorje's claim relates to work that was performed prior to 2 May 1990. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council

resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

247. With respect to the claim relating to work performed in the period from 2 May to 29 September 1990, Primorje did not provide adequate evidence in support of its claim, such as detailed applications for payment, approved payment certificates, interim certificates, progress reports, account invoices or actual payments received. Accordingly, the Panel recommends no compensation for this portion of the claim, as Primorje did not submit sufficient evidence of the loss.

(b) Taxes and dues

248. Primorje seeks compensation for asserted losses totalling USD 1,686,700 relating to taxes and dues. This appears to consist of losses relating to vehicle insurance, registration fees and customs duty. It is Primorje's contention that these amounts were payable by the employer. It relies on Clause 26 (3) and (4) of the "General Conditions of Contract" of the main Contract 1100 to support this contention. The invoices submitted are not translated but the dates on some of them extend to 1982.

249. The Panel finds that Primorje did not submit sufficient evidence. Further, where a date was discernible on the invoice, the claim relates to debts or obligations of Iraq arising prior to 2 August 1990. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991).

(c) Unamortised value of assembly elements factory and the camp

250. Primorje seeks compensation for an amount of USD 5,757,389.

251. Primorje asserts that due to its inability to complete the work, the investment that it had made in a precast elements factory and camp has only been partially repaid. It claims for the undepreciated part of the precast elements factory as an amount of USD 3,633,452 and for the camp as USD 2,123,937. The total asserted loss is USD 5,757,389.

252. Primorje relies on article 32.7 of the main contract to justify compensation for these amounts as the contract, it alleges, was terminated due to special risks. The special risk clause does, however, stipulate that the contractor shall be paid "insofar as such amounts or items shall not have already been covered by payments on account made to the contractor". (Emphasis added)..

253. The issue that arises in relation to this claim is whether Primorje has indeed been compensated for these amounts over the period of the contract. The main contract 1100 was signed in April 1981 and this is an indication of the period of time during which Primorje may have received these relevant payments. It is not apparent from the documentation submitted as to when the temporary work factory and camp were built. Further, the figures upon which the calculations are based do not have supporting documents verifying their accuracy nor an explanation of the basis of arriving at a particular method of calculation.

254. The Panel recommends no compensation as Primorje did not submit sufficient evidence to establish that the claim was within the jurisdiction of the Commission. Nor did the evidence submitted demonstrate a loss. Further, the evidence did not establish how the losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

(d) Undepreciated value of temporary works

255. Primorje seeks compensation for the amount of USD 2,368,638.54.

256. Of the total claimed amount for this loss item, the amount of USD 1,509,102.54 relates to the "undepreciated value of joint preparation works on the Project 1101". The balance of the claim totalling USD 859,536.00 is stated as concerning the undepreciated value of temporary works on Project 1101 concerning sub-stations TS 1, 2, and 3. This included building works, costs for connecting to the main power station and preparation work for the cancelled residential villas.

257. In support of the loss element, Primorje submitted a schedule describing the preparatory works. With respect to the claim for costs for preparatory work for substations TS 1, 2, and 3, connecting to the main power station and preparation work for the cancelled residential villas, a description of the loss is submitted by Primorje. The loss is calculated as the value of the unreimbursed costs of the preparatory work done less depreciated amounts. In support of this loss it submitted a "priced bill of quantities" with no supporting explanations.

258. With respect to the asserted losses concerning the temporary works, the comments made relating to the previous loss item are applicable. The Panel recommends no compensation as Primorje did not submit sufficient evidence to establish that the claim is within the jurisdiction of the Commission. Nor did the evidence demonstrate a loss. Further, the evidence did not establish how the losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

(e) Unamortised fixed costs

259. Primorje seeks compensation for the value of unamortised fixed costs totalling USD 2,475,354. These costs consist of the following:

(i) "Commercial treatment of the business" (USD 611,199);

(ii) "Expenses for the business with FDSP" (USD 1,842,412); and

(iii) "Expenses of managing board in Baghdad" (USD 21,743).

(a) "Commercial treatment of the business"

260. Primorje refers to clause 3.6.1 of its contract with its co-contractors which provides for a "recompense in amount of 0.8% of total agreed price". This amount relates to work carried out by Trudbenik for which it was entitled to be compensated by Iraq. Primorje states that it paid Trudbenik an amount of USD 1,468,874. Its claim appears to be based on the unamortised portion of this

payment and is stated as USD 611,199. In support of its claim, Primorje submitted two invoices, dated 20 August 1981 and 18 June 1982 respectively. It also submitted two untranslated documents.

261. The Panel recommends no compensation as Primorje did not submit sufficient evidence to establish that its claim was within the jurisdiction of the Commission. Nor did the evidence demonstrate a loss. Further, the evidence did not establish how the asserted loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(b) "Expenses for the business with FDSP"

262. Primorje seeks compensation for costs which it asserts that it paid FDSP, in advance, totalling USD 1,842,412. These costs include the costs relating to bank guarantees, letter of credit, insurance costs, transaction costs for payment instruments and "business costs" of FDSP. The costs are based on various percentage amounts. Primorje submitted a schedule and various invoices dating from 1982 to 1989 to support its claim. The percentage figure used to derive the amortised amount is not explained. Further, the documents submitted reflect that payment occurred during the period from 1981 through to 1989.

263. The Panel recommends no compensation as Primorje did not submit sufficient evidence to establish that it incurred a loss or that the asserted loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(c) Expenses of managing board in Baghdad

264. Primorje seeks compensation of USD 21,743 for asserted unamortised expenses of its managing board in Baghdad and an "international translator". The unamortised portion of the expenses are asserted as arising out of an initial amount of USD 52,255 which Primorje states that it paid. Various invoices have been submitted which reflect dates of 1985 and 1988. The Panel recommends no compensation as Primorje did not submit sufficient evidence to establish that it incurred a loss or that the asserted loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(f) "Other costs that arose due to suspension of contract"

265. Primorje seeks compensation in the total amount of USD 664,568 for other asserted costs arising due to the suspension of the contract works. These costs are summarised in table 23, infra.

266. In support of its claim, Primorje submitted copies of its payroll records, invoices, transportation, travel receipts and hotel receipts. A number of these costs relate to Primorje's efforts to mitigate its losses. Where the Panel was satisfied that the costs were directly related to Iraq's invasion and occupation of Kuwait and that Primorje had submitted sufficient evidence, the Panel recommended compensation in an appropriate amount.

267. With respect to the claims relating to meetings held in Yugoslavia and Iraq, the costs which appear to the Panel to be properly attributable to Iraq's invasion and occupation of Kuwait are the costs attributable to the meetings of August 1990, October 1990 and 28 January 1991. Thereafter, the

meetings appear to be concerned with the restoration of the project, and the costs of those meetings are not compensable.

268. The Panel's recommendations for "other costs that arose due to suspension of contract" are summarised in table 23, infra.

Table 23. Primorje's claim for contract losses ("other costs that arose due to suspension of contract")

	Claim item	Claim amount (USD)	Recommended compensation (USD)
i	Payroll costs for September 1990	261,987	103,639
ii	Fuel purchase in September 1990	35,953	34,055
iii	Electricity costs for September 1990	18,774	17,781
iv	Photocopy and archiving	875	836
v	Security costs after departure	21,178	3,750
vi	Business travel (meetings in Yugoslavia; August - October 1990 and January 1991)	1,307	1,307
vii	Business travel (meetings in Baghdad 11-17 May 1992)	4,099	nil
viii	Business travel (manager in Iraq 22 March–1 April 1992)	8,303	nil
ix	Travel for settling of accounts (Iraq, 26 April–5 July 1992)	149,567	nil
x	Expenses for visit; April-July 1992	162,525	nil
	Total	664,568	161,368

(g) "Postponed payments"

269. Primorje seeks compensation in the amount of USD 18,810,571 for asserted losses arising out of "postponed payments." This claim comprises a claim for interest on deferred payments totalling USD 5,709,339 and a claim for asserted exchange rate losses totalling USD 13,101,232.

270. Both these claims arise out of the intergovernmental agreement between the Governments of the former Yugoslavia and Iraq. Under the terms of that agreement, Iraq undertook to pay interest of 5 per cent per annum on outstanding amounts. The first agreement was entered into on 18 October 1983 and further agreements "were signed almost every year". The last agreement was signed on 16 May 1990. The calculation of the interest is not explained clearly. Based on the agreement of 16 May 1990, the interest due date was 31 December 1990. Primorje calculates the interest due to it as amounting to USD 5,709,332.54. The schedule submitted by Primorje reflects payment dates ranging from 8 January 1987 to 8 November 1989. It submitted numerous untranslated documents to support its contentions.

271. The claim for the asserted exchange rate loss is based on negative exchange rate differences between the Yugoslav dinar and the United States dollar. Primorje calculates the value of its "credits" to be USD 14,742,333 in about November 1989. Primorje states that the value of its credit in about October 1990 was USD 1,641,100.85. It attributes this reduction to a negative exchange rate. It, therefore, asserts its loss as the difference between USD 14,742,133 and USD 1,641,100.85. This results in the claimed amount of USD 13,101,232. The claim for the exchange rate loss is supported by various untranslated documents from "Narodna Banka Jugoslavije" and schedules produced by Primorje. The dates on the schedules reflect decision dates from the National Bank of Yugoslavia from 15 December 1986 to 1 November 1989.

272. The Panel finds that the claim for the interest and asserted exchange rate losses is based on work that was performed prior to 2 May 1990. Applying the approach taken with respect to the "arising prior to" clause set out in paragraphs 41 to 43 of the Summary, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Consequently the Panel is unable to recommend compensation.

B. Loss of profits

273. Primorje seeks compensation in the amount of USD 1,557,262 for asserted loss of profits in respect of contract 1101 and it calculated its loss of profits on the following basis:

Total contract value less executed works x 5% = USD 1,557,262.14

(USD 106,381,994.86 – USD 75,236,752 = USD31,145,242.86 x 5%)

274. Primorje did not submit supporting evidence for its asserted loss of profits, for example, audited financial statements, budgets, management accounts, turnover, original bids, profit/loss statements, finance costs and head office costs prepared by or on behalf of Primorje for each accounting period commencing in year one of the project and continuing through March 1993. The Panel finds that Primorje failed to fulfil the evidentiary standard for loss of profits claims as set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation.

C. Loss of tangible property

275. Primorje seeks compensation in the amount of USD 10,061,495 for loss of tangible property.

(a) "Replacement of movable property"

276. Primorje seeks compensation in the amount of USD 1,690,019 relating to machinery and equipment for use on the construction project. Primorje states that the equipment was imported on a temporary basis. The equipment was used on the Project 1101/4 at Al-Kassek in Iraq.

277. According to Primorje, the machinery was purchased between 1982 and 1984. It asserts that due to delays on the project, the machinery was "used in very small measures and with full capacity they worked only for four years". Primorje asserts that the period of durability of the construction equipment is about 15 years. It has claimed for a value of 50 per cent of the purchase price of the

machinery and equipment. The basis for this amount is not explained. A number of spares were also imported and Primorje indicated that these were "estimated in 100% of their purchased price, because that were new or almost new parts for replacement".

278. It is not clear as to what exactly happened to the property in question. Primorje states that a list of all its movable property indicating their storage was handed over to the resident engineer's office in Iraq under cover of a letter dated 29 September 1990. Primorje submitted a schedule consisting of 162 items for which it seeks compensation. This schedule has various backing documents including invoices and packing lists. The Panel finds that, whilst Primorje did submit documents which sought to establish its claim, many of the supporting documents were not translated into English. Further, many of the items claimed are either discounted or submitted at full invoice value. There is no adequate explanation from Primorje for both the discounting and basis for it or the submission of items at full invoice value. Even assuming that the items claimed were in Iraq (there is no independent evidence of this), the Panel is unable to determine their value.

279. The Panel recommends no compensation for replacement of moveable property.

(b) Machinery and other temporary imported equipment

280. Primorje seeks compensation totalling USD 4,874,303 for other tangible property which it states that it abandoned in Iraq. This property includes heavy construction equipment, trucks, buses, passenger vehicles and tractors. Primorje bases its claim upon the unamortised value of the movable property. The amount claimed is derived from a 50 per cent reduction in value of the property.

281. In a response to a question contained in the article 34 notification, Primorje states that it had permission from the Iraqi authorities to re-export part of the machinery. This approval, however, was subsequently withdrawn. Primorje did not state the date on which the approval was granted nor when it was withdrawn. The issue of causation is not clear. Primorje states that the list of its movable property was made on the site of the project by its workers on 23 June 1992. This would appear to suggest that some, if not all, of the machinery was in existence in June 1992 and, therefore, raises the issue as to whether a direct causal link between the alleged loss of its machinery and equipment and Iraq's invasion and occupation of Kuwait has been established.

282. Primorje submitted a number of schedules of the items for which it seeks compensation. This schedule has various backing documents including invoices. A number of the documents are untranslated.

283. The Panel finds that Primorje did not establish that the property losses were caused as a direct result of Iraq's invasion and occupation of Kuwait on 2 August 1990, given that the property was still in existence in Iraq in June 1992. Further, the Panel is not able to conclude what valuation, if any, to place on the items included in the claim as Primorje failed to submit complete translations of the documents submitted and a basis for its valuation methods.

284. The Panel recommends no compensation for machinery and other temporary imported equipment.

(c) "Capital material of collaborators"

285. Primorje seeks compensation for USD 702,838 relating to the material of its collaborators which remained in Iraq. Primorje states that in fulfilling its contractual obligations, it needed to engage certain specialists. For the painting, it used the services of "Bojoplast"-Pula, Croatia ("Bojoplast"). For work relating to aluminium carpentry it used "Elemes"-Sibenik, Croatia ("Elemes").

286. At the time of the evacuation from Iraq, Primorje asserts that Bojoplast left behind paints, cement, glaze and tools. Primorje submitted a letter from Bojoplast dated 7 March 1991 which stated the losses as totalling USD 47,930. Extracts of minutes between Primorje and Bojoplast dated 19 September 1990, are submitted. These minutes refer to materials that were stored by Primorje on behalf of Bojoplast. It would appear that this is the basis upon which Primorje submitted its claim to the Commission, i.e. that it had the responsibility to "take care of" Bojoplast's materials.

287. The issue of causation relating to the asserted losses of Bojoplast is not clear. Primorje did not state what exactly happened to the property in question. Primorje states that a list of the property indicating their storage was handed over to the resident engineer's office in Iraq under cover of a letter dated 29 September 1990. There is no evidence submitted which substantiates the value of the equipment nor is there evidence that Primorje was liable for, or paid the amount in question.

288. The claim on behalf of Elemes is for an amount of USD 654,907. Primorje asserts that Elemes left on the building site "unbuilt" exterior aluminium carpentry and the related tools. Primorje submitted a letter (undated) from Elemes which outlines its claim. The claimed amounts would appear to be a combination of contract losses and tangible property losses. No explanation is submitted relating to the items claimed in the undated letter from Elemes. In addition, no contract documents are submitted nor copies of payments made. Further, there is no independent evidence of the presence of the items of tangible property claimed in Iraq. Such evidence could include, for example, proof of manufacture, transportation documents, importation documents and invoices.

289. The Panel recommends no compensation for the claim for the "capital material of collaborators" as Primorje did not submit sufficient evidence to establish a loss.

(d) Capital material of Primorje

290. Primorje seeks compensation for USD 2,794,335 for asserted losses to its "capital material". The claim comprises the following elements:

Table 24. Primorje's claim for loss of tangible property (capital material)

Claim item	Claim amount (USD)
Construction materials	551,688
Specialist trade works	129,899
Equipment for erecting construction	222,502
Goods in the warehouse	567,971
"ROCA" sanitary wares	9,351
Material for installation works	1,312,924
Total	2,794,335

291. Primorje contends that the construction material was to be built into the construction works and it remained on the site due to Iraq's invasion and occupation of Kuwait.

292 Primorje states that the list of the materials was handed over to the resident engineer under cover of a letter dated 29 September 1990. With respect to the balance of the claim, the quantities claimed are based on those stated in the letter dated 29 September 1990 from FDSP. They represent Primorje's own details forwarded on their behalf to the resident engineer, but they are not agreed quantities. The rates are based on Bill of Quantities general unit prices and not actual invoices for specific deliveries. As the date of delivery is not defined, the extent to which the value has increased over and above the 30 April 1990 certification cannot be determined and the adjustment for the already-paid sums cannot be completed.

293. Primorje also states that: "[a]ll the abovementioned property we consider as expropriated, for which till today we haven't received any compensation. Expropriation of the property was confirmed by Iraqi Government decision of 1992." Assuming that Primorje did indeed overcome the evidentiary burden relating to the asserted losses, the Panel concludes that this property was confiscated. Applying the approach taken with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait set out in paragraph 146 of the Summary, the Panel recommends no compensation.

D. Payment or relief to others

1. Facts and contentions

294. Primorje seeks compensation in the total amount of USD 833,118 for payment or relief to others. As a result of the suspension of the project works, Primorje states that it evacuated 105 employees from the project in August and September 1990. The costs claimed are summarised in table 25, infra:

Table 25. Primorje's claim for payment or relief to others (evacuation costs)

Claim item	Claim amount (USD)
"Working on and preparation of workers for departure"	33,445
Departure of the workers to Iraq	114,762
Evacuation of 1st group of workers (August 1990)	43,456
Evacuation of 2nd, 3rd and 4th group of workers (September 1990)	189,661
Evacuation of 5th group of workers (October 1990)	36,028
Medical examination of evacuated workers	57,987
Head office expenses	110,173
Paid leave for August, September and October 1990	247,606
Total	883,118

2. Analysis and valuation

295. With respect to the claims for the departure of workers to Iraq, these consisted of asserted expenses, incurred prior to Primorje's workers departure to Iraq and included medicals, transport costs, airport taxes, daily allowances and the cost of unused air tickets. In support of these claims, Primorje submitted copies of cash requisitions, invoices, and receipts from Yugoslav airlines. The dates on the invoices and receipts submitted indicate that the asserted expenses occurred in June and July 1990. Given the dates of the expenditure in question, the Panel finds that these amounts claimed could not have been incurred as a direct result of Iraq's invasion and occupation of Kuwait. The Panel did consider whether these items should have been reclassified as contract losses rather than payment or relief to others. However, even if they had been reclassified as contract losses, given the difficulties the Panel had outlined relating to the contract loss, the Panel is of the view that the claims would still not have been compensable. The Panel recommends no compensation for these loss items.

296. With respect to the claim for the evacuation of the workers, Primorje submitted various invoices, receipts, copies of correspondence, requisitions for allowances, invoices from Yugoslav airlines and statements from its employees. The Panel, in its previous reports, has established the principle that the extraordinary costs of repatriation, i.e., the costs over and above what Primorje would have paid in any event at the natural conclusion of its work are compensable to the extent that the costs are supported by proof of payment. Accordingly, the Panel recommends compensation in the amount of USD 50,752 for the evacuation costs.

297. With respect to Primorje's claim for the cost of medical examinations and payment of wages upon the workers' return home. Primorje did not submit evidence for the basis of the expenses, nor

proof of payment. The Panel recommends no compensation for medical examinations and payment of wages upon return.

298. The claim for head office expenses are supported by Primorje's departmental payrolls for August and September 1990. However, the Panel is unable to verify the assertion of Primorje with regard to the work allocation of this staff, in the absence of evidence confirming what exactly the workers were doing, such as time sheets, activity reports, statements from the employees, etc. Accordingly, the Panel recommends no compensation for this loss element.

299. With respect to the claim for paid leave for August, September and October 1990, Primorje states that upon the workers' arrival from Iraq, it was unable to employ them immediately. It, therefore, sent them on leave. Primorje states that according to "our laws" they were required to pay the workers whilst they were on leave. In support of the claim, Primorje submitted two schedules relating to what appears to be payments. In the absence of a clear explanation, the Panel was unable to identify from the schedules submitted the relevant payments. The Panel, accordingly, recommends no compensation.

3. Recommendation

300. The Panel recommends compensation in the amount of USD 50,752 for payment or relief to others.

E. Summary of recommended compensation for Primorje

Table 26. Recommended compensation for Primorje

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	12,618,472	161,368
Loss of profits	1,557,262	nil
Loss of tangible property	10,061,495	nil
Payment or relief to others	833,118	50,752
Total	25,070,347	212,120

301. Based on its findings regarding Primorje's claim, the Panel recommends compensation in the amount of USD 212,120. The Panel finds the date of loss to be 2 August 1990.

VII. BABCOCK ENTREPRISE

302. Babcock Entreprise ("Babcock") is a corporation organized according to the laws of France. Babcock had a contract with the Ministry of Electricity and Water in Kuwait at the time of Iraq's invasion and occupation of Kuwait. Babcock seeks compensation in the total amount of USD 678,125 (KWD 195,978) for asserted contract losses.

Table 27. Babcock's claim

Claim element	Claim amount (USD)
Contract losses	678,125
Total	678,125

A. Contract losses

1. Facts and contentions

303. Babcock seeks compensation for asserted contract losses totalling USD 678,125 (KWD 195,978). Babcock had a contract with the Ministry of Electricity and Water ("MEW") in Kuwait. A copy of the contract is not provided. The claim appears to consist of two elements. The first relates to outstanding amounts in terms of the contract (KWD 175,615.953). The second element of the claim is for an amount of KWD 20,362 which is the value of spare parts that appeared to be on-site in March 1990.

304. With respect to the claim for outstanding contract amounts, Babcock submitted a payment certificate dated 16 May 1990. This certificate indicates that work to the value of KWD 3,488,405 was completed and payment for an amount of KWD 3,218,769 had been made. Babcock accordingly seeks compensation for the amount of the balance outstanding of KWD 175,616.

305. With respect to the claim for the spare parts, Babcock, according to a letter dated 22 March 1990 from it to an enterprise called "Thuwainy Trading Co.", sought to dispose of the spare material it had on site. It lists spare parts to the value of KWD 11,868 as being available for sale. Spare parts, (mainly pipe fittings), valued at KWD 8,494.500, were to be cleared from the site and to be sold "at a reduced price on the local market". Babcock offered Thuwainy Trading Co. a commission of "up to 20% of the money recovered on selling the surplus material". There is no evidence of Thuwainy Trading Co. agreeing to the terms of the letter.

306. Babcock did not submit copies of the contract with MEW. It is therefore unclear to the Panel what the payment terms were. Apart from the letter to Thuwainy Trading Co. there is no detailed description of how it was going to be paid for the sale of the spare parts.

2. Analysis and valuation

307. Babcock was sent an article 34 notification on 28 February 2000 and was requested to respond by 28 June 2000. It did not do so and a reminder notification was sent to it on 4 July 2000. Babcock did not respond to the reminder notification.

308. With respect to the claim for the KWD 175,616 which is asserted as outstanding on the contract, Babcock submitted, in its original filing, a payment certificate dated 16 May 1990. Babcock did not submit a copy of the contract and any approved variations as well as contract conditions (neither general nor particular), applications for payment, approved payment certificates, interim certificates, progress reports, account invoices and actual payments received. Further, Babcock provided no submission as to why this amount remained unpaid as of 2 August 1990 and why it remained unpaid to date.

309. With respect to the claim relating to the spare parts, Babcock submitted, in its original filing, a copy of the letter dated 22 March 1990 to Thuwainy Trading Co. It also submitted various documents bearing the letterhead of MEW which relate to a "Record of Inspection of spare parts, special tools and material to be handed over to MEW stores". These documents only carry the signatures of Babcock, and not MEW, and are not dated.

310. Alternatively, if Babcock's claim is for asserted tangible property losses, and not contract losses as stated by Babcock, it did not submit (a) evidence that it departed Kuwait during the relevant time period, (b) independent proof of ownership relating to the assets claimed, and (c) evidence that these items were on site prior to 2 August 1990.

311. The Panel recommends no compensation for the asserted losses as Babcock did not submit sufficient evidence to establish its loss.

3. Recommendation

312. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Babcock

Table 28. Recommended compensation for Babcock

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	678,125	nil
Total	678,125	nil

313. Based on its findings regarding Babcock's claim, the Panel recommends no compensation.

VIII. BEICIP-FRANLAB

314. Beicip-Franlab ("Beicip"), is a corporation organized according to the laws of France. At the time of Iraq's invasion and occupation of Kuwait on 2 August 1990, Beicip was undertaking two contracts with the Kuwait Oil Company ("KOC"). Beicip seeks compensation in the total amount of USD 187,928 (985,118 French francs (FRF)) for contract losses arising out of the disruption of the contracts.

Table 29. Beicip's claim

Claim element	Claim amount (USD)
Contract losses	187,928
Total	187,928

A. Contract loss

1. Facts and contentions

315. Beicip seeks compensation for losses totalling USD 187,928 (FRF 985,118) for contract losses arising out of two contracts ("contract number one" and "contract number two") that it entered into with KOC.

(a) Contract number one

316. Beceip seeks compensation for USD 106,360 (FRF 557,539) arising out of contract number one.

317. Beicip entered into contract number one on 12 September 1989 with KOC. The contract was for "Petroleum Consultancy Services for the New Petroleum Engineering Laboratory and Core Store-Ahmadi". The duration of the contract was four years. Beicip was to provide the following services:

Stage I – Final design stage

Stage II – Project construction stage

Stage III – Equipment specifications

Stage IV – Initial operation

Stage V – Training

318. According to Beicip, Stage III of the contract was scheduled to commence on 12 November 1989. At the time of Iraq's invasion and occupation of Kuwait on 2 August 1990, Beicip asserts that it had completed approximately 75 per cent of the services for stage III. It had not commenced the other stages.

319. As at 2 August 1990, Beicip had issued KOC with four invoices of KWD 4,626 each and had been paid the total amount of KWD 18,504 relating to the invoices. On 2 August 1990, Beicip stated that it had issued a further four invoices for an amount of KWD 4,626 each. These invoices totalled KWD 18,504. It had not been paid for them by KOC.

320. On 6 August 1990, Beicip sent a letter to KOC invoking the force majeure provisions of its contract. Beicip received various amounts of compensation from Compagnie Française d'Assurance pour le Commerce Extérieur ("COFACE"), an organization that covered risk in export contracts. It also received a payment in 1992 from KOC.

(b) Contract number two

321. Beicip seeks compensation for USD 81,568 (FRF 427,579) for asserted contract losses arising out of contract number two. Beicip entered into contract number two with KOC on 30 April 1990 for the "execution of the detailed engineering for the petroleum and core storage laboratories-Ahmadi". The contract value was stated to be KWD 203,050.00.

322. Beicip states that the contract was for a duration of four and a half years. The contract was approximately 48 per cent completed at the time of Iraq's invasion and occupation of Kuwait. Beicip subcontracted parts of the contract to Cabinet Michel Picard (CMP) (France), Sechaud Et Metz (France) and Inco-Eng. At the time of Iraq's invasion and occupation of Kuwait, two invoices issued on 31 July 1990 were outstanding. These totalled KWD 60,915.

323. On 6 August 1990, Beicip sent a letter to KOC invoking the force majeure provisions of contract number two. Beicip received various amounts of compensation from COFACE. It also received a payment in 1992 from KOC.

2. Analysis and valuation

324. Beicip contends that the circumstances of the invasion made it impossible to continue with the two contracts. Beicip invoked the force majeure clauses in the contracts. This, it asserts, was accepted by KOC. However, Beicip did not submit a copy of the respective contracts. It did submit a copy of what purports to be the force majeure clause. This, however, is a single page document which provides the circumstances in which force majeure may be invoked. It does not identify the rights and obligations of the parties with regard to payment or other financial terms.

325. Beicip did not provide applications for payment, approved payment certificates, interim certificates, progress reports, account invoices and actual payments received. It did not submit details of the insurance coverage provided by COFACE. Beicip was sent an article 34 notification on 28 February 2000 and was to respond by 28 June 2000. It did not do so and a reminder notification was sent to it on 4 July 2000. Beicip did not respond to the reminder notification.

326. In the absence of detail necessary to determine what was due and when it was due in terms of the original contracts with KOC, the Panel finds that it is not possible to reconcile the amounts

received from KOC and COFACE. Such detailed documentation would assist in establishing what amounts were recovered by Beicip from KOC and COFACE, respectively.

327. The Panel recommends no compensation as Beicip did not submit sufficient evidence to establish a loss.

3. Recommendation

328. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Beicip

Table 30. Recommended compensation for Beicip

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	187,928	nil
Total	187,928	nil

329. Based on its findings regarding Beicip's claim, the Panel recommends no compensation.

IX. CEGELEC

330. Cegelec is a corporation organized according to the laws of France. Cegelec states that on 28 June 1988 it entered into a contract with the Ministry of Electricity and Water of Kuwait ("MEW") for the design, supply and installation of a control centre for the electrical network of the area of Jahra, Kuwait. Cegelec asserts that the contract with MEW was disrupted by Iraq's invasion and occupation of Kuwait on 2 August 1990. Cegelec seeks compensation in the total amount of USD 21,532,441 (stated as FRF 123,701,663) for asserted contract losses, tangible property losses, payment or relief to others, financial losses and interest.

331. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Cegelec's claim for interest.

Table 31. Cegelec's claim

Claim element	Claim amount (USD)
Contract losses	6,981,528
Loss of tangible property	807,732
Payment or relief to others	766,364
Financial losses	3,437,476
Interest	9,539,341
Total	21,532,441

332. On 18 October 1999, Cegelec was sent an article 15 notification requesting it to comply with the formal requirements for filing a claim. Cegelec was requested to reply on or before 18 April 2000. Cegelec did not submit a reply. On 26 April 2000, Cegelec was sent a reminder. The deadline for Cegelec to reply was 26 June 2000. Cegelec did not reply to the reminder notification.

333. On 28 February 2000, Cegelec was sent an article 34 notification requesting it to furnish further evidence in support of its claim. Cegelec was requested to reply on or before 28 June 2000. Cegelec did not submit a reply. On 4 July 2000, Cegelec was sent a reminder article 34 notification. The deadline for Cegelec to reply was 18 July 2000. Cegelec did not reply to the reminder article 34 notification.

334. Notwithstanding the requirements of article 15 and 34 of the Rules, the Panel considered such information and documentation as had been submitted and found it to be insufficient to support the claim.

335. The Panel recommends no compensation.

X. COGELEX ALSTHOM

336. Cogelex Alsthom ("Cogelex"), is a corporation organized according to the laws of France. Cogelex is a manufacturer of switch gear, power transformers, current and voltage transformers and protective relays. Cogelex was undertaking several contracts in Kuwait at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990. It seeks compensation in the total amount of USD 1,614,391 (stated as FRF 9,082,682) for contract losses, loss of tangible property, payment or relief to others, financial losses and interest.

337. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Cogelex's claim for interest.

Table 32. Cogelex's claim

Claim element	Claim amount (USD)
Contract losses	399,773
Loss of tangible property	361,145
Payment or relief to others	605,481
Financial losses	10,616
Interest	237,376
Total	1,614,391

338. On 18 October 1999, Cogelex was sent an article 15 notification requesting it to comply with the formal requirements for filing a claim. Cogelex was requested to reply on or before 18 April 2000. Cogelex did not submit a reply. On 26 April 2000, Cogelex was sent a reminder. The deadline for Cogelex to reply was 26 June 2000. Cogelex did not reply to the reminder notification.

339. On 28 February 2000, Cogelex was sent an article 34 notification requesting it to furnish further evidence to develop its claim. Cogelex was requested to reply on or before 28 June 2000. Cogelex did not submit a reply. On 4 July 2000, Cogelex was sent a reminder article 34 notification. The deadline for Cogelex to reply was 18 July 2000. Cogelex did not reply to the reminder article 34 notification.

340. Notwithstanding the requirements of article 15 and 34 of the Rules, the Panel considered such information and documentation as had been submitted and found it to be insufficient to support the claim.

341. The Panel recommends no compensation.

XI. LARSEN & TOUBRO LIMITED

342. Larsen & Toubro Limited ("Larsen") is a company incorporated according to the laws of India. According to its memorandum of association, Larsen's objectives include "to carry on business as civil, mechanical, electrical, chemical and agricultural engineers". Larsen was undertaking five projects in Iraq and Kuwait at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990. Larsen seeks compensation in the total amount of USD 20,039,525 for contract losses, loss of tangible property, payment or relief to others and financial losses.

Table 33. Larsen's claim

Claim element	Claim amount (USD)
Contract losses	2,560,801
Loss of tangible property	8,214
Payment or relief to others	1,974
Financial losses	17,468,536
Total	20,039,525

A. Contract losses

343. Larsen seeks compensation in the amount of USD 2,560,801 for contract losses.

(a) Contract losses (with Iraqi party)

344. Larsen was involved in three contracts in Iraq at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990. These projects were: the International Football Stadium, Missan, the Border Check post complex, Safwan, and the Police Headquarters Project, Baghdad.

(i) International Football Stadium, Missan, Iraq

345. Larsen seeks compensation for USD 143,837.85 (IQD 44,824.812) arising out of a contract to build a football stadium in Iraq. The contract submitted by Larsen, dated 10 August 1980, was between Engineering Construction Corporation Limited ("ECC") and the State Organisation of Building of Iraq, the employer on the project. ECC is stated to be a wholly-owned subsidiary of Larsen.

346. The contract value was stated as IQD 6,253,220.160 without contingencies, or IQD 6,941,074.380 including contingencies and supervision. It was scheduled for completion within 821 days. The stadium was to have a capacity of 25,000 spectators.

347. The employer on the project was to make a down payment of 10 per cent of the contract price without contingencies, that is, IQD 625,322. This down payment was to be recovered over a maximum period of 25 months commencing with the second monthly progress payment after payment of the down payment. The contract price was payable in Iraqi dinars (30 per cent) and in United States

dollars (70 per cent). The maintenance period of the contract was to run for 18 months after the preliminary taking-over.

348. In support of its claim, Larsen submitted a copy of a portion of the contract and a copy of a letter dated 8 May 1990 relating to "Final Measurement of Football stadium." This letter refers to a balance payable on 31 March 1990 as IQD 44,824.812. In its reply to the article 34 notification, Larsen submitted what it termed a "final acceptance certificate" dated 21 July 1985. No additional evidence was submitted by Larsen, stating that its documentation was either abandoned or lost in Kuwait and Iraq.

349. Larsen states that the work relating to the contract commenced on 10 August 1980 and was completed on 21 July 1985. The Panel finds that the work was performed prior to 2 May 1990. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel recommends no compensation.

(ii) Border check post complex, Safwan, Iraq

350. Larsen seeks compensation for USD 20,202 (IQD 6,296) for outstanding contract amounts arising out of a contract to construct boundary check posts at Safwan on the Iraq-Kuwait border. The contract, dated 15 June 1981, was between ECC and the State Organisation of Building of Iraq, the employer on the project. ECC is stated to be a wholly-owned subsidiary of Larsen.

351. The contract value was stated as IQD 3,283,810 without contingencies or IQD 3,645,029 including contingencies and supervision. It was scheduled for completion within 638 days and the maintenance period of the contract was to run for 18 months after the preliminary taking over. The employer on the project was to make a down payment of 15 per cent of the contract price without contingencies, that is, IQD 492,572. This down payment was to be recovered over a maximum period of 19 months commencing with the second monthly progress payment after payment of the down payment. The contract price was payable in Iraqi dinars (25 per cent) and in United States dollars (75 per cent).

352. In support of its claim, Larsen submitted a copy of the contract and a copy of a letter dated 6 May 1990 from the Ministry of Housing of Iraq which states that as at 31 March 1990, the final payment on the contract was IQD 6,296. Larsen submitted no additional evidence, stating that its documentation was either abandoned or lost in Kuwait and Iraq.

353. Larsen states that it commenced work under the contract on 15 June 1981 and completed the work on 3 June 1985. The Panel finds that the work was performed prior to 2 May 1990. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel recommends no compensation.

(iii) Police headquarters project, Baghdad

354. Larsen seeks compensation for USD 1,167,672 (IQD 363,887) arising out a contract to construct a building for the directorate general of the police. The contract submitted by Larson is dated 26 October 1981 and was between ECC and the State Organisation of Building of Iraq, the employer on the project. The claim is for retention amounts allegedly outstanding under the contract.

355. The contract value was stated as IQD 14,089,207 without contingencies, or IQD 15,639,020 including contingencies and supervision. It was scheduled for completion within 913 days. The employer on the project was to make a down payment of 15 per cent of the contract price without contingencies, that is, IQD 2,113,381. This down payment was to be recovered over a maximum period of 28 months commencing with the second monthly progress payment after payment of the down payment. The contract price was payable in Iraqi dinars (25 per cent) and in United States dollars (75 per cent).

356. The maintenance period of the contract was to run for 18 months after the preliminary taking over. The details relating to the deduction of a retention amount and when it was due to be paid are not stated. Larsen does state that the work relating to the contract commenced on 26 October 1981 and was completed on 12 June 1990.

357. In support of its claim, Larsen submitted a portion of a copy of the contract and a copy of a letter dated 22 April 1992 from the Ministry of Housing of Iraq which states that as at 31 March 1992, the retention amount on the contract was IQD 363,887. In reply to the article 34 notification, Larson submitted a copy of what it called a "final acceptance certificate" from the Ministry of National Housing dated 12 June 1990. Larsen submitted no additional evidence, stating that its documentation was either abandoned or lost in Kuwait and Iraq. Larsen did not submit evidence of copies of applications for payments, copies of retention amounts paid nor did it submit the relevant clauses from the contract which dealt with the whole issue of retention. The form of final completion states that, after extensions, the contract was completed on 31 March 1987. The maintenance period began on 1 June 1987 and was completed on 30 November 1988.

358. Larsen submitted no explanation for the significant length of time between the completion of the maintenance period and the issue of the final acceptance certificate of 12 June 1990. The Panel finds that Larsen did not submit sufficient evidence or explanations to entitle it to receive compensation of the retention money in question. In particular it did not explain the considerable period of delay between its completion of the maintenance period and the issue of the final acceptance certificate.

359. The Panel recommends no compensation for the claim for contract losses on the police headquarters project.

(b) Contract losses (contract with Kuwaiti party)

360. Larsen seeks compensation for contract losses arising out of two contracts that it had in Kuwait, which it states were interrupted as a result of Iraq's invasion and occupation of Kuwait.

(i) Indian embassy building

361. Larsen seeks compensation for KWD 66,263 (USD 212,042) arising out of a subcontract to construct the works for the Indian embassy building in Kuwait. The subcontract submitted by Larsen is dated 16 October 1988. The subcontract is between Consolidated Contractors Company (Kuwait) K.L.L ("CONCO") and ECC. CONCO was awarded the main contract by the Government of India with respect to all the works relating to the construction of the Indian embassy building in Kuwait.

362. The contract value was not stated. Larsen states that the contract was scheduled for completion on 7 July 1992. Under the applicable payment arrangements, Larsen was to submit a monthly statement of work done and materials delivered to the site. CONCO was to make "prompt" applications for payment in terms of the main contract "from time to time". In addition, CONCO was to submit a statement which included the work done and materials supplied by Larsen. Within 15 days of receiving payment from the employer, CONCO was due to pay Larsen.

363. In support of its claim, Larsen submitted a portion of the contract and a letter to the Ministry of External Affairs of India dated 21 December 1992. The letter outlines the amounts which Larsen asserts as outstanding to it. Larsen did not submit the complete contract nor any approved variations or contract conditions (neither general nor particular), applications for payment, approved payment certificates, interim certificates, progress reports, account invoices or actual payments received.

364. The Panel recommends no compensation as Larsen did not submit sufficient evidence to establish the value of the work done and what amounts, if any, were owed to it.

(ii) Mechanical projects

365. Larsen seeks compensation for contract losses totalling USD 271,357(KWD 84,799) arising out of a joint venture contract that it had with CONCO. On 4 January 1983 CONCO entered into a joint venture agreement with Larsen. CONCO had a number of mechanical projects in Kuwait and wanted to "associate and cooperate in a joint venture for the performance and completion of the works..."

366. CONCO and Larsen agreed to participate in the joint venture's profits and losses at a 70 to 30 per cent ratio respectively. Larsen's claim appears to be based on amounts which were owed to it by its joint venture partner. In a letter from Larsen dated 1 June 1991, addressed to CONCO at a location in Greece, it sought payment of certain amounts. The requested payments included an amount due in terms of a letter to Larsen from CONCO dated 1 October 1989 (KWD 24,900), a revaluation of stock items (KWD 8,956) and interest.

367. Larsen did not submit any explanation as to why CONCO failed to pay. Larsen, in its response to the article 34 notification, states that "[w]e have no knowledge of other contracting party having gone into liquidation." Indeed, according to its letter dated 1 June 1991, Larsen was in communication with the other contracting party in Greece. The letter outlines the amounts that Larsen asserts as outstanding to it. Larsen did not submit the details of its various contracts awarded under the joint venture, applications for payment, approved payment certificates, interim certificates, progress reports, account invoices or actual payments received. There were no details submitted

relating to payments received from the joint venture nor an explanation as to the amounts asserted as owing to it by CONCO.

368. The Panel recommends no compensation as Larsen did not establish how the losses arose directly as a result of Iraq's invasion and occupation of Kuwait. Further, the Panel finds that Larsen did not submit sufficient evidence to demonstrate what amounts were owing to it.

B. Loss of tangible property

369. Larsen seeks compensation in the amount of USD 8,214 (KWD 2,567) for loss of tangible property. The claimed items include stock, a photo copy machine, a video player and a colour television. They were all from the Indian Embassy building project in Kuwait.

370. Larsen did not submit evidence to support its asserted losses apart from a copy of the contract for the Indian Embassy in Kuwait project. Appropriate evidence might have included, for example, evidence of title, receipts, purchase invoices, bills of lading, insurance documents, customs records, inventory lists, asset registers, hire purchase or lease agreements, transportation documents and other relevant documents generated prior to 2 August 1990. There is evidence of the departure of Larsen's employees from Kuwait but no proof of ownership of the assets, and that these items were on site prior to 2 August 1990.

371. The Panel recommends no compensation as Larsen did not submit any proof of ownership of the assets, and that these items were on site in Kuwait prior to 2 August 1990.

C. Payment or relief to others

372. Larsen seeks compensation in the amount of KWD 617 (USD 1,974) for payment or relief to others. The claim is for reimbursement of expenses that its two employees allegedly incurred while in Kuwait from 2 August to 8 September 1990. This claim includes food expenses, travel expenses, "out of pocket" expenses and other miscellaneous expenses. The employees were employed on the Indian Embassy project in Kuwait. Larsen submitted the family name, first name and nationality of its employees. Larsen submitted a bank payment voucher and a signed acknowledgement of receipt of payment by its two employees.

373. The Panel finds that Larsen submitted sufficient evidence to demonstrate its loss and recommends compensation in the total amount of KWD 617 (USD 1,974).

D. Financial losses

374. Larsen seeks compensation in the amount of USD 17,468,536 for financial losses.

(a) "Deferred dollar outstanding"

375. Larsen seeks compensation in the amount of USD 16,288,549 for amounts held in bank accounts in Iraq and interest thereon. These claims are described as claims for "deferred dollar outstanding" by Larsen. The copy of the letter from Export-Import Bank of India dated 23 April 1991

refers to the "principal balances in various accounts of EXIM Bank with the Central Bank of Iraq on account of your projects in Iraq". This would appear to be a reference to deposits in bank accounts in Iraq.

376. With respect to the claim for loss of funds in the Iraqi bank account, Larsen submitted a copy of the contract and a letter from the Export- Import Bank of India dated 23 April 1991. Applying the approach taken with respect to loss of funds in bank accounts, set out in paragraphs 135 - 139 of the Summary, the Panel recommends no compensation.

(b) "Interest on borrowings"

377. Larsen seeks compensation for 32,007,662 Indian rupees (INR) and USD 1,179,987 for asserted losses arising out of interest on bank loans for the projects in Iraq and Kuwait. Larsen submitted a schedule in which it states that it suffered an "extra burden for non-receipts of payments from clients in Iraq and Kuwait and consequent non-liquidation of loan". The claims relate to the period from 31 March 1992 to 31 March 1993.

378. In support of its claim for interest on borrowings, Larsen submitted a schedule of the asserted interest. Assuming the claims are within the jurisdiction of the Commission, the Panel notes that Larsen did not submit copies of the agreement for the bank loans, nor proof of the interest rate, nor proof of payment for the loans. The Panel recommends no compensation for interest on borrowings as Larsen did not submit sufficient evidence to demonstrate a loss.

379. The Panel recommends no compensation for financial losses.

E. Summary of recommended compensation for Larsen

Table 34. Recommended compensation for Larsen

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	2,560,801	nil
Loss of tangible property	8,214	nil
Payment or relief to others	1,974	1,974
Financial losses	17,468,536	nil
Total	20,039,525	1,974

380. Based on its findings regarding Larsen's claim, the Panel recommends compensation in the amount of USD 1,974. The Panel finds the date of loss to be 2 August 1990.

XII. HITACHI ZOSEN CORPORATION

381. Hitachi Zosen Corporation ("Hitachi") is a company incorporated according to the laws of Japan. Hitachi builds various classes of marine and naval vessels. It also manufactures industrial machinery and chemical plants. Hitachi seeks compensation in the amount of USD 411,404 for asserted loss of tangible property in Kuwait and payment or relief to others arising out of its evacuation of its employees from Iraq.

Table 35. Hitachi's claim

Claim element	Claim amount (USD)
Loss of tangible property	391,530
Payment or relief to others	19,874
Total	411,404

A. Loss of tangible property

1. Facts and contentions

382. Hitachi seeks compensation in the amount of USD 391,530 for loss of tangible property.

383. Hitachi seeks compensation for 48,880,000 Yen ("JPY") (USD 338,856) for five ammonia lorry tanks that it asserts were lost in Kuwait during Iraq's invasion and occupation of Kuwait. These ammonia trucks were dispatched to Kuwait from Japan on 7 May 1988 and 16 June 1988 respectively.

384. The ammonia trucks were kept in Kuwait as they were allegedly used to transport ammonia purchased in Kuwait to Baiji, Iraq. Hitachi had a contract with the Iraqi State Organisation of Industrial Design and Construction for the commissioning of fertiliser plant number four in Baiji. After Iraq's invasion and occupation of Kuwait on 2 August 1990, Hitachi stated that "we have no communication about the existence of these five tanks with Kuwaiti company 'United Housing Systems' in charge of stock of these five tanks, which were operated and managed by an Egyptian."

385. Hitachi also seeks compensation for an amount of JPY 7,598,186 (USD 52,674) for the "parts of evaporator for Petrochemical Industries Company . . ." According to Hitachi's statement of claim, this property was imported from the United States of America on 21 April 1990.

386. Hitachi states that these spare parts were missing following Iraq's invasion and occupation of Kuwait and they were unable to locate the property at the Kuwait port. A copy of a fax dated 30 October 1990 from Khalifa Al Jassim Trading and Contracting Company in Kuwait has been submitted. This fax seeks to explain that the customs formalities on the consignment were completed on 24 July 1990 but the goods were not available for delivery as they had remained unpacked. Apparently there were some delays in getting the required authority from the port authorities. The fax states that the consignment was unpacked on 1 August 1990.

2. Analysis and valuation

387. In support of the claim for the ammonia trucks, Hitachi submitted an invoice for the shipment of four tanks to Kuwait dated 10 May 1988 and another invoice dated 10 June 1988 for the shipment of one tank to Kuwait. It also submitted an invoice from a Kuwaiti company, United Construction Materials, Industrial Products and Equipment for the storage of five tanks for the period 1 July 1990 to 31 July 1990. Hitachi submitted a portion of the contract that it had with the Iraqi employer.

388. Hitachi indicated that these vehicles were to be used for transporting ammonia once the plant was in production. Hitachi stated that the fertiliser plant was handed over on 21 June 1990. However, it provided no evidence in support of this assertion. The Panel accepts that the early supply of these vehicles (two years before the completion of the plant) was sensible in that such vehicles would be of use in testing the plant prior to handover. What is not clear is why, assuming the vehicles arrived about the time suggested in the filed papers, they were not handed over (and paid for) well prior to the invasion. Article 34 questions were sent to Hitachi seeking clarification of this issue but no response was received.

389. With respect to the claim for the spare parts, Hitachi submitted an invoice and packing list dated 3 April 1990 issued by a United States-based company, Swenson Process Equipment Inc. Hitachi also submitted a copy of a shipping document dated 3 May 1990 and a copy of a fax dated 30 October 1990 from Khalifa Al Jassim Trading and Contracting Company. Hitachi did not respond to the detailed questions concerning this loss element in the article 34 notification. These questions sought to elicit information on the reason for the location of the property in Kuwait. The article 34 notification sent to Hitachi requested details of proof of ownership, the purpose for which the spares were required and details of the contract conditions. This information was not submitted.

3. Recommendation

390. The Panel recommends no compensation for tangible property losses as Hitachi did not submit sufficient evidence of its loss.

B. Payment or relief to others

391. Hitachi seeks compensation in the amount of USD 19,874 for payment or relief to others. This claim is for payments allegedly made on behalf of four of its Japanese employees who were working on the site of the Baiji contract in Iraq. The employees were fulfilling the maintenance requirements in terms of the contract.

392. After Iraq's invasion and occupation of Kuwait, Hitachi asserts that the four employees departed Iraq on 23 August 1990. The employees travelled to Amman then onto Paris and then London before travelling finally to Tokyo on 30 August 1990. Hitachi seeks compensation for the costs of air tickets and hotel accommodation in Baghdad, Amman and London for its employees. Hitachi also seeks compensation of JPY 205,000 for the costs of reimbursing its employees for the loss of their personal effects upon departure from Iraq. The claimed amount includes books, clothes, radios and cassette recorders.

393. Hitachi provided the following information about each employee: family name, first name, and passport number with issuing country. It also submitted copies of airline tickets, hotel invoices, hotel receipts and application forms for purchase of foreign currency for Rasheed Bank. Hitachi did not, however, provide the material to enable the Panel to conclude how these evacuation costs were extraordinary in nature as beyond the costs it would have incurred in any event upon natural completion of the project. Questions relating to these matters were contained in the article 34 notification. Assuming for the moment that there was an extraordinary element in these costs Hitachi did not provide sufficient evidence to quantify the claim.

394. With respect to the claim for the asserted reimbursement of its employees, Hitachi submitted a schedule listing the items. It did not submit proof of payment of this cost and proof of the existence of these assets.

395. The Panel recommends no compensation for payment or relief to others.

C. Summary of recommended compensation for Hitachi

Table 36. Recommended compensation for Hitachi

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	391,530	nil
Payment or relief to others	19,874	nil
Total	411,404	nil

396. Based on its findings regarding Hitachi's claim, the Panel recommends no compensation.

XIII. ASHCO INTERNATIONAL CORPORATION

397. Ashco International Corporation ("Ashco") is a company existing under the laws of Jordan involved in the construction of housing projects. Ashco seeks compensation in the total amount of USD 31,420,807 (20,674,891 Jordanian dinars (JOD)) for contract losses and "other" losses. The Panel has reclassified Ashco's claim for "other losses" as a claim for contract losses.

Table 37. Ascho's claim

Claim element	Claim amount (USD)
Contract losses	31,420,807
Total	31,420,807

A. Contract losses

1. Facts and contentions

398. Ashco seeks compensation in the amount of USD 31,420,807 (JOD 20,674,891) for contract losses.

399. Ashco was established in 1985 to undertake a housing project in Amman, Jordan, in two phases. The first phase was the construction of 419 villas. Ashco asserts that it had allocated half of the proposed villas to be built to accommodate the return of the expatriate Jordanian/Palestinian communities in Kuwait. Ashco had commenced feasibility studies in 1983; and these took two years to complete. Ashco had targeted the project for the expatriate Jordanian community in Kuwait, which it asserts numbered 500,000 people.

400. The project was initially called "Bader City" but its name was later changed to "Al Karmel City". It is not entirely clear when the project commenced, however, newspaper cuttings sent by Ashco suggest that this was in January 1986. One of the relevant newspaper articles also indicates that the project was to be completed in "five years".

401. The purchaser was required to pay an amount consisting of 40 per cent of the land value upon signing the contract with Ashco. The land was to be registered in the name of the purchaser. The balance of the purchase price was payable in instalments.

402. Ashco had opened a Kuwaiti branch in order to market the project to the Jordanian expatriate community in Kuwait. This branch was staffed by seven people. Ashco asserts that there were approximately 400 "beneficiaries" – i.e., buyers from Kuwait.

403. Ashco states that as a consequence of Iraq's invasion and occupation of Kuwait, payments due to it from the purchasers were never paid. Ashco states that the Government of Jordan and the Municipality of Amman eventually made a decision in 1997 to "take the project from the company after knowing that the company can't continue the services and its surroundings." Ashco states that it

has "many claims" against it. The company's headquarters in Jordan were vacated in 1999 after being sold in an auction apparently to execute a claim against it. Ashco lists its losses as follows:

(a) "Contracts unpaid by clients, but paid by us to subcontractors like buildings and infrastructure";

(b) Depreciation in equipment;

(c) Depreciation and devaluation for tools and equipment;

(d) Loss of raw materials;

(e) Fees for designs, supervision and planning;

(f) Salaries for employees;

(g) Fees for licensing etc;

(h) Lost profits due to a devaluation in value of land and inability to sell the plots;

(i) Rent paid;

(j) Depreciation in office furniture; and

(k) Wages for delegations and permanent representatives in Kuwait.

404. Ashco states that the "amount of losses is based on the book value as based on our budgets/balance sheets." Ashco contends that its losses arose out of a lack of liquidity in Jordan. This lack of liquidity arose from four sources:

"1-The expatriate transfers.

2- The foreign Aid, 90% is from the Gulf Countries.

3-Trade with Iraq.

4-Trade with the Gulf states."

405. Ashco contends that Iraq's invasion and occupation of Kuwait led to the lack of liquidity in Jordan. Ashco further contends that there were political solutions which were making it possible for the Palestinians to return to Palestine. In addition, Ashco asserts that the stance of the Palestinian Liberation Organization, in supporting Iraq, made it difficult for the Palestinians to return to Kuwait after the liberation of Kuwait. These factors, according to Ashco, made the Palestinians unlikely to return to Kuwait. Accordingly, they would not have been in a financial position to continue to fund the purchase of their property.

2. Analysis and valuation

406. From the assertions made by Ashco, there appears to have been a multiplicity of contributing factors that ultimately led to the failure of the project. Accordingly, the Panel is unable to conclude that it failed as a direct result of Iraq's invasion and occupation of Kuwait.

407. In addition, the major deficiency in the evidence submitted by Ashco is its failure adequately to itemise its losses and to explain how it arrived at the particular amounts claimed. This issue was specifically raised with Ashco in the article 34 notification sent to Ashco. Ashco's response to the article 34 notification and subsequent filings include inadequate answers on critical aspects of the claim. For example, Ashco was requested to submit, with respect to the expenses incurred under the contract, evidence of the actual costs. In its reply, Ashco narrated the expense item but did not include the amount. It did leave a space for the amount but omitted to fill this in.

408. The Panel finds that Ashco did not submit sufficient explanations or evidence to establish its loss. Accordingly, the Panel recommends no compensation.

3. Recommendation

409. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Ashco

Table 38. Recommended compensation for Ascho

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	31,420,807	nil
Total	31,420,807	nil

410. Based on its findings regarding Ashco's claim, the Panel recommends no compensation.

XIV. CONSTRUCTION COMPANY PELAGONIJA

411. Construction Company Pelagonija ("Pelagonija") is a corporation registered in the District Commercial Court of Skopje, in the former Yugoslav Republic of Macedonia. It was involved in a number of construction projects in Kuwait at the time of Iraq's invasion and occupation of Kuwait. Pelagonija seeks compensation in the amount of USD 1,079,859 for contract losses, loss of tangible property, payment or relief to others, claim preparation costs and interest.

412. In its reply to the article 15 notification, Pelagonija states that it has undergone several changes to its legal status and it presently exists as "ADG PELAGONIJA".

413. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Pelagonija's claim for interest.

Table 39. Pelagonija's claim

Claim element	Claim amount (USD)
Contract losses	361,450
Loss of tangible property	460,770
Payment or relief to others	62,342
Interest	195,297
Total	1,079,859

A. Contract losses

1. Facts and contentions

414. Pelagonija seeks compensation in the amount of USD 361,450 for asserted contract losses.

415. On 24 March 1990, Pelagonija and the FDSP entered into a contract with the Ministry of Defence, Military Engineering Projects, Kuwait ("the employer"). The contract related to the design and construction of the Military Training Buildings in Kuwait ("Project 1827"). According to the terms of the contract, Pelagonija was responsible for the design and execution of Project 1827. FDSP, together with Pelagonija, was responsible for negotiating and concluding agreements with respect to the employer, bank guarantees and collection of payments, as well as corresponding with the employer.

416. The contract price was a lump sum amount of USD 39,532,907. The completion date is not indicated in the contract documentation submitted. At the time of Iraq's invasion and occupation of Kuwait on 2 August 1990, Pelagonija stated that only the preliminary works on the contract had been executed. Preliminary works commenced in March-April 1990. Pelagonija seeks compensation for the asserted value of the preliminary works completed prior to the invasion and occupation of Kuwait. Pelagonija states that the preliminary works were destroyed during the invasion and occupation.

417. The contract price was payable in United States dollars and Kuwaiti dinars. The proportion is not clear. With respect to when payments were to be made, there is reference in clause 6.6 of the contract to "temporary monthly accounts" made by the employer, which may suggest that payments were made monthly. Pelagonija negotiated directly with the employer and in August 1992 a new contract for Project 1827 was entered into. FDSP was not a party to this contract. The value of the contract was USD 37,931,982. Pelagonija states that it completed this contract in March 1996. According to Pelagonija, the final certificate indicated the value of the completed works as USD 35,965,495. Pelagonija received payment of the total amount due to it under the new contract.

418. Pelagonija states that the preliminary works were redone as they had been destroyed during the invasion by Iraq. It asserts that it was not paid by the employer for the value of the work that it undertook originally with respect to the preliminary work that was destroyed.

2. Analysis and valuation

419. The contract documentation submitted by Pelagonija is not clear as to when the particular work was performed apart from the assertion by Pelagonija that it commenced in March-April 1990. Linked to the uncertainty about the performance date is the lack of detail as to when payment was due for the preparatory works.

420. Pelagonija contends that it could not claim damages from the employer as "only preliminary works had been executed on P-1827, which were not destroyed at the employers fault." In short, it would appear that it is Pelagonija's contention that it was not entitled to seek compensation from the employer. Pelagonija states further that the preliminary works could not be invoiced to the employer as they were included in the unit price of the project. In the absence of detail relating to the payment arrangements, it is not possible to verify this assertion. It is difficult to reconcile this assertion with the fact that Pelagonija had indeed invoiced the employer for work executed in July 1990.

421. Pelagonija submitted a copy of extracts of the contract that it had with the employer. Pelagonija submitted a single sheet of paper for the Month of July 1990 relating to "site preparatory works" and on this sheet appears the claim for the amount of USD 361,450. In response to the article 34 notification, Pelagonija also submitted invoices for materials that may have been used in the preliminary works. Pelagonija did not submit complete contract documentation, applications for payment, approved payment certificates, interim certificates, progress reports, account invoices or actual payments received.

422. The Panel recommends no compensation as Pelagonija did not submit complete contract documentation nor did it submit sufficient evidence to verify the performance of the work and the quantum performed. In any event, Pelagonia has failed to establish that the asserted losses were suffered as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

423. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

424. Pelagonija seeks compensation in the amount of USD 460,770 for asserted loss of tangible property in Kuwait.

425. Pelagonija seeks compensation in the amount of USD 182,513 for equipment and material and USD 278,257 for "inventory loss" arising out of the Jabrija Project. On 27 July 1987, Pelagonija entered into a subcontract with the firm Boodai Construction ("Boodai"), a company incorporated in Kuwait, for the execution of a residential complex in Jabrija. The contract price was KWD 2,412,000 and Pelagonija handed over the project in June-July 1990. It was paid in full for the work on the project.

426. According to the subcontract, Pelagonija was obliged to remove from the project site its property upon completion of the project. Pelagonija states that it was in the process of removing its property when Iraq's invasion and occupation of Kuwait occurred. Pelagonija's employees in Kuwait abandoned the site. The abandoned property consisted of prefabricated buildings used for offices and warehouses, motor vehicles, furniture, tools, measuring instruments and electrical devices.

427. In response to the article 34 notification, Pelagonija reduced its claim for equipment and material from KWD 53,523 to KWD 36,387. The claim for inventory was reduced from KWD 81,600 to KWD 49,720. According to Pelagonija this was due to the application of a depreciation value "according to the legal regulations applicable at the time in Jugoslavia."

2. Analysis and valuation

428. Pelagonija submitted copies of the subcontract, an inventory schedule (unsigned), various receipts along with translation of these receipts and invoices reflecting purchase of items in Kuwait. The supporting documentation consists of two volumes.

429. With respect to the claim for equipment and material, as the inventory/schedule of loss is not dated or signed, the Panel finds that the presence of the items on site at 2 August 1990 is not demonstrated. The schedule may include all items purchased prior to 2 August 1990, and not just what was present as at 2 August 1990. The Panel recommends no compensation for equipment and material due to a lack of independent evidence and Pelagonija's failure to demonstrate an actual loss.

430. The Panel finds that inventory would normally be included in monthly certificates issued by a contractor to the employer. Pelagonija provided no evidence that the spare parts and inventory were not included in the monthly certificates issued. With respect to the claim for inventory, the project is stated as handed over to the employer in July 1990. The Panel therefore considers it likely that Pelagonija would have recovered the cost of these expendable and consumable items during the currency of the contract. Accordingly, the Panel recommends no compensation for the claim for inventory

3. Recommendation

431. The Panel recommends no compensation for loss of tangible property.

C. Payment or relief to others

432. Pelagonija seeks compensation for payment or relief to others in the amount of USD 62,342 (KWD 18,282).

433. Pelagonija states that Iraq's invasion and occupation of Kuwait resulted in additional expenses to it. The exact evacuation dates are not stated but Pelagonija states that the work on the projects stopped and it had to incur costs for wages, food and transport. The workers were flown home by the Yugoslav national airline. The claimed amounts are summarised in table 40, infra.

Table 40. Pelagonija's claim for payment or relief to others

Claim item	Claim amount (KWD)
August 1990 salaries	7,378
"Fees of salaries"	793
Salaries for local workers in Kuwait	1,961
Rent paid in advance	5,400
"Payment through cash register" for food allowances for 17 workers	75
Petrol expenses for August 1990	161
Air tickets for four workers	164
Air tickets for seven persons	404
Air tickets for six persons	255
Expenses for four day stay in Iraq	1,691
Total	18,282

434. The Panel summarises its findings and recommendations in table 41, infra.

Table 41. Pelagonija's claim for payment or relief to others – Panel's recommendations

Claim item and evidence	Panel's recommendation	Recommended award
August 1990 salaries Translation of schedule of total amount paid. Schedule of workers and hours and amounts paid.	Compensable - sufficient evidence of loss	KWD 7,378
Fees for salaries for August 1990 No evidence/untranslated	Not compensable - insufficient evidence	nil
August 1990 salaries for local workers Translation of schedule of total amount paid Schedule of workers and amounts paid.	Not compensable as cannot reconcile currency calculations of original document with translation	nil
Rent Translation of receipt	Not compensable as no causal link established	nil
Payment for food Translated voucher	Compensable-sufficient evidence of loss	KWD 75
Petrol expenses Translated summary of petrol expenses for August 1990	Compensable-sufficient evidence of loss	KWD 35
Air tickets "Translation" of three letters dated 2, 14 & 16 August 1990 and amounts converted to KWD. Partially translated receipts from JAT	Not compensable. Responsibility to transport workers back is Pelagonija's. Did not demonstrate that expense was extraordinary	nil
Expense for four days in Iraq Translation contains no details of expenses	Not compensable-insufficient evidence	nil

435. The Panel recommends compensation in the amount of USD 25,907 for payment or relief to others.

D. Claim preparation costs

436. Pelagonija asserts a claim for claim preparation costs based on 3 per cent of "the amount of the main claim". In its reply to the article 34 notification, Pelagonija states that the claim was prepared by Pelagonija staff members. Applying the approach taken with respect to claim preparation costs set out in paragraph 60 of the Summary, the Panel makes no recommendation for claim preparation costs.

E. Summary of recommended compensation for Pelagonija

Table 42. Recommended compensation for Pelagonija

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	361,450	nil
Loss of tangible property	460,770	nil
Payment or relief to others	62,342	25,907
Interest	195,297	- -
Total	1,079,859	25,907

437. Based on its findings regarding Pelagonija's claim, the Panel recommends compensation in the amount of USD 25,907. The Panel finds the date of loss to be 2 August 1990.

XV. VAN OORD INTERNATIONAL B.V.

438. Van Oord International B.V. ("Van Oord") is a company incorporated according to the laws of the Netherlands. The extract from the trade register describes it as involved in "contracting and executing works home and abroad". Van Oord seeks compensation in the total amount of USD 28,410,266 (KWD 8,210,567) for contract losses, business transaction losses, loss of tangible property, payment or relief to others, financial losses and other losses.

Table 43. Van Oord's claim

Claim element	Claim amount (USD)
Contract losses	15,449,242
Business transaction losses	1,620,844
Loss of tangible property	983,785
Payment or relief to others	574,429
Financial losses	9,008,689
Other losses	773,277
Total	28,410,266

A. Contract losses

1. Facts and contentions

439. Van Oord seeks compensation in the amount of USD 15,449,242 for contract losses.

440. Van Oord formed a joint venture with a Kuwaiti company, Al-Hani Construction and Trading Bureau ("Al-Hani") on 19 January 1989. The joint venture entered into a contract on 21 January 1989 with the Ministry of Public Works of Kuwait (the "employer") for the execution of the Land Reclamation and Marine Works of the Amiri Diwan Project, Kuwait. Van Oord states that the scope of the works included "the construction, completion, maintenance of marine works and land reclamation for Amiri Diwan, Crown Prince and Prime Minister's office and Council of Ministers".

441. The price for the completion of the project was a contract lump sum of KWD 8,866,311. The contract commenced on 4 February 1989 and was due to be completed on 2 September 1990.

442. The work to be undertaken "comprised of dredging works to provide a navigation channel and a marina, reclamation works using the dredged material to produce areas upon which future buildings would be constructed (separate contracts), rock work, break waters to form a lagoon and revetments to protect the newly reclaimed areas, concrete structures in guard houses, and a helipad structure." Van Oord states that the work on the site began as scheduled, that the land reclamation phase of the work

was at an "advanced stage," the rock work and work on other marine structures was about to commence at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990.

443. In its response to the article 34 notification, Van Oord stated that the project was less than 50 per cent complete at the time of the invasion. Work on the project was not resumed due to "the failure of negotiations on payment, terms and conditions."

444. Van Oord states that the Iraqi troops occupied the work site and its staff had to flee or were imprisoned. Van Oord asserts that it suffered losses as follows:

Table 44. Van Oord's claim for contract losses

Claim item	Claim amount (KWD)	Claim amount (USD)
Contract works carried out by 2 August 1990	1,995,477	6,904,765
Additional works carried out by 2 August 1990	3,88,747	1,345,145
Materials delivered to site on 2 August 1990	19,726	68,256
Contract entitlements for additional works	3,319,133	11,484,889
Preliminary facilities installed by 2 August 1990	739,160	2,557,647
Finance charges on outstanding amounts	2,218,955	7,678,045
Finance charges on Loss of turnover	384,556	1,330,644
Other costs and losses	223,477	773,277
Less advance payment	(625,705)	(2,165,069)
Engineers adjustment	(7,766)	(26,872)
Previous payment	(1,363,941)	(4,719,519)

445. The Panel has classified the claim for "finance charges on outstanding amounts" and "finance charges on loss of turnover" as claims for "financial losses". The claim for "other costs and losses" is reclassified as "other losses".

446. The claim for the contract amounts are extracted from the "Contractor's Final Account" dated 1 September 1992.

2. Analysis and valuation

447. The contract with the employer included a "special risks" clause. Clause 60(2) provides that the contractor is "entitled to be paid for any work and for any materials" destroyed. Clause 65(5) provides

for the "outbreak of war". In the event of the termination of the contract due to war, the contractor was entitled to payment for "for all work executed prior to the date of termination at the rates and prices provided for in the contract" (clause 65(6)).

448. It also includes additional costs to be paid by the employer to the contractor including:

(i) The cost of materials ordered for the works; and

(ii) The reasonable costs of repatriating all of the contractor's staff and workers.

449. In response to the article 34 notification, Van Oord submitted copies of correspondence that it sent to the employer in which it sought payment in terms of the special risks clause. Van Oord acknowledges that the employer, the Ministry of Public Works of Kuwait, "continues to exist in its original form". There is no averment as to why the Ministry cannot pay the amounts that were due to Van Oord. Indeed, in its response to a question included in the article 34 notification, Van Oord stated that the work on the project was not resumed due to "the failure of negotiations on payment, terms and conditions." It would appear, therefore, that in spite of the very specific terms of the special risks clauses contained in the contract, an independent decision was made by the employer not to pay Van Oord.

450. In support of its claim, Van Oord submitted a copy of the contract between the joint venture and the Ministry of Public Works, Kuwait, and a copy of the joint venture agreement. It also submitted a copy of the contractor's final account, final account with summary of value of total contract work completed or percentage completion, summary of preliminary works and the contractor's signed payment certificate number 12 dated 31 May 1990.

451. The evidence submitted by Van Oord did not establish exactly when the work was performed. With respect to some of the documents submitted, it is clear that elements of the work were fully completed at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990. There is no explanation offered as to why certain amounts were not paid when due.

452. The documents submitted in support of Van Oord's claim for contract losses appear to have been prepared by Van Oord. Apart from a certificate number 12, dated 31 May 1990, which is signed, the rest of the documentation is not signed by the employer. In the absence of the applications for payment, approved payment certificates, interim certificates, progress reports, account invoices and actual payments received, it is not possible to verify the various amounts claimed.

453. The Panel recommends no compensation for the contract losses as Van Oord did not establish how these losses arose as a direct result of Iraq's invasion and occupation of Kuwait. In the absence of an explanation by Van Oord, the employer's refusal to honour the special risks clauses of the contract cannot be attributable to Iraq. In any event, it did not submit sufficient evidence to verify the amounts claimed.

3. Recommendation

454. The Panel recommends no compensation for contract losses.

B. Business transaction losses

1. Facts and contentions

455. Van Oord seeks compensation in the amount of USD 1,620,844 (KWD 468,424) for business transaction losses. This comprises claims for amounts that include materials in storage, and "advances" and "deposits" which were made to suppliers for goods and services relating to the project. It also includes a claim for cancellation costs paid to suppliers.

2. Analysis and valuation

456. With respect to the loss relating to "rockwork materials", Van Oord submitted copies of invoices for storage costs for the period 2 August 1990 to 2 August 1991. It also submitted receipts of payment. Van Oord also submitted a letter from Stevin Rock Joint Venture dated 6 May 1990 which refers to a delivery to Kuwait by it of a portion of rock on 22 December 1989. It further states that it had about 110,000 tons of materials in stock for Van Oord. The Panel finds that the evidence suggests material was in storage up to 2 August 1990. However, it is not clear as to what became of this material as the project did not progress. The material may have been utilised on another project or sold. The absence of any explanation means that it is not possible for the Panel to determine whether any loss was suffered.

457. With respect to the claim for "rockwork mattress", Van Oord submitted a copy of part of an invoice dated 31 August 1990 which refers to geofabric. The order was placed about 11 months prior to the invasion and occupation of Kuwait. The Panel finds that Van Oord did not submit details as to when it was to be delivered, proof of payment, where the items are at present or why they could not have been resold or used on another project. The claim for the cancellation charges is supported by a number of bank statements, and a rental agreement dated 7 June 1990 for "CAT-Equipment" for a 12-month period. However, the Panel finds that there is no explanation submitted reconciling or seeking to clarify the information submitted.

458. The Panel recommends no compensation for business transaction losses, as Van Oord did not submit sufficient evidence or explanations to establish a loss.

3. Recommendation

459. The Panel recommends no compensation for business transaction losses.

C. Loss of tangible property

1. Facts and contentions

460. Van Oord seeks compensation in the amount of USD 983,785 (KWD 284,314) for loss of tangible property.

461. Van Oord states that Iraq's invasion and occupation of Kuwait resulted in the occupation of the project site. Its staff evacuated Kuwait at the time of the invasion. Upon their return, they discovered

that equipment, files and plant materials were lost or destroyed. Van Oord asserts that the following property outlined in table 45, infra was lost or destroyed:

Table 45. Van Oord's claim for loss of tangible property

Claim item	Claim amount (KWD)	Claim amount (USD)
Radio equipment	1,215	4,204
Survey equipment	15,430	53,391
Pumps and generators	2,440	8443
Welding equipment	3,400	11,766
Excavation and earthwork equipment	94,809	328,059
Fuel tanks	5,054	17,488
Marine vessels	36,127	125,007
Electrical equipment	16,300	56,401
Containers	2,400	8,304
Miscellaneous tools and equipment	24,264	83,958
Office equipment	82,875	286,764
Total		1,620,844

462. In its reply to the article 34 notification, Van Oord sought to increase the claim for the asserted loss of survey equipment by KWD 2,618 to KWD 18,048. Applying the approach taken with respect to amendment of claims after filing set out in paragraphs 35 to 36 of the Summary, the Panel does not take into account the attempt by Van Oord to increase its claim.

2. Analysis and valuation

463. Van Oord stated that it received compensation from its insurers for certain of its tangible property losses.

464. The Panel finds that Van Oord submitted evidence that (a) it departed from Kuwait during the relevant time period, (b) it owned to some of the assets claimed and (c) that these items were on site prior to 2 August 1990. The Panel recommends compensation as outlined in table 46, infra, taking into account depreciation and the insurance payments received by Van Oord:

Table 46. Van Oord's claim for loss of tangible property – Panel's recommendations

	Claim item	Recommendations
1	Radio equipment	nil
2	Survey equipment	NLG 21,718
		AED 13,980
		USD 3,930
3	Pumps and generators	KWD 1,104
		AED 8,896
4	Welding equipment	KWD 264
5	Excavation and earthwork equipment	KWD 1,041
6	Fuel tanks	nil
7	Marine vessels	KWD 4,766
8	Electrical equipment	KWD 13,260
9	Containers	nil
10	Miscellaneous tools and equipment	nil
11	Office equipment	nil
		NLG 4,690
		AED 3,111
	Subtotal	KWD 20,435
		NLG 26,408
		AED 25,987
		USD 3,930

3. Recommendation

465. The Panel recommends compensation of USD 96,714 for loss of tangible property.

D. Payment or relief to others

1. Facts and contentions

466. Van Oord seeks compensation in the amount of USD 574,429 (KWD 166,010) for payment or relief to others. The claim consists of "additional costs of personnel accommodation" USD 113,028 (KWD 32,665) and "costs of personnel payments and compensation" USD 461,401 (KWD 133,345).

467. Van Oord states that its employees were forced to flee Kuwait or go into hiding in order to avoid capture by the Iraqi forces. In addition, a number of its employees were captured and held in captivity by the Iraqi forces. Van Oord states that they were released in December 1990.

468. The claim for "additional costs of personnel accommodation" relates to asserted payments made by Van Oord to compensate its employees for rent paid for apartments, deposits paid on apartments, furniture, deposits for car rentals and loss of a motor vehicle.

469. The claim for "costs of personnel payments and compensation" relates to repatriating its employees and their families to the Netherlands, Kuwait and India. It includes subsistence payments, salary costs and "loss or damage to personnel effects".

2. Analysis and valuation

470. The basis for Van Oord's liability for rent paid for apartments, deposits paid on apartments, furniture, deposits for car rentals and loss of a motor vehicle, is not explained. With respect to the cost of the rentals on the apartments, the lease agreements are in the name of Van Oord. There is inadequate proof of payment of the rental in advance or the deposits by the employees. There are various invoices submitted as proof of the claim for the furniture. Again, there is no evidence that the employees incurred the costs relating to the furnishing of the apartments as a number of the receipts are in the name of Van Oord. The documentation provided in support of the claim for the car rentals and loss of the motor vehicle is insufficient to establish the basis of a claim.

471. The "costs of personnel payments and compensation" relating to repatriating its employees and their families to the Netherlands, Kuwait and India along with the subsistence payments, salary costs and "loss or damage to personnel effects" are not supported by detailed evidence or explanations. The documentation that was submitted is not supported by an explanation and is often untranslated. From the invoices and receipts submitted by Van Oord, the Panel is unable to establish the loss claimed.

3. Recommendation

472. The Panel recommends no compensation for payment or relief to others.

E. Financial losses

473. Van Oord seeks compensation in the amount of USD 9,008,689 for financial losses. The claim is for finance charges on "amounts outstanding and due" (KWD 2,218,955) or (USD 7,678,045) and "anticipated turnover" (KWD 384,556) or (USD 1,330,644).

474. In support of the claim for finance charges on "amounts outstanding and due", Van Oord submitted a schedule entitled "From 2/2/90 To The Present And Continuing" which has asserted charges which total KWD 2,218,955. There are no further explanations or documents submitted. In support of the claim for finance charges on "anticipated turnover", Van Oord submitted a single sheet of paper entitled "Finance Charges on Anticipated Turnover". There is a build up of the charges culminating in an asserted total of KWD 384,556. No further evidence or explanations are submitted.

475. The Panel recommends no compensation for financial losses as Van Oord did not submit sufficient evidence and explanations of its loss.

F. Other losses

1. Facts and contentions

476. Van Oord seeks compensation in the amount of USD 773,277 (KWD 223,477) for other losses. The items forming part of the claim are as follows:

Table 47. Van Oord's claim for other losses

	Claim item	Claim amount (KWD)
a	Loss of contract files	3,500
b	Head office costs	70,063
c	Costs of damage survey and assessment	59,061
d	Legal costs and administration	25,745
e	Abortive design costs	39,578
f	Loss of insurance premiums	25,530

(a) Loss of contract files

477. Van Oord asserts the loss on the basis of files lost or destroyed.

(b) Head office costs

478. Van Oord's claim is based on the costs of the staff involved in the project until their redeployment (KWD 43,250). It includes engineering, drawing and administrative departments of the company as well as company management.

479. The second element of the claim is for the costs in head office "attributable to the management of all matters related to the contract" (KWD 26,813.492). This includes the costs of a manager, accountant, secretary, telephone and fax costs.

(c) Costs of damage survey and assessment

480. Van Oord's claim appears to relate to the services provided by Pontin International, whose letterhead describes them as being "contract consultants risk management". The services were rendered during the period June 1991 to April 1992.

481. The invoices submitted by Pontin International to Van Oord indicate that work was performed "on account of professional services in respect of your international projects". Other than that detail, it is not possible to ascertain what services were rendered.

(d) Legal costs and administration

482. Van Oord's claim relates to advice from legal advisers in the United Kingdom and Kuwait on the legal position vis-a-vis the Ministry of Public Works of Kuwait, Al Hani, Van Oord's partner in the joint venture, and general advice on the Kuwaiti legal position.

(e) Abortive design costs

483. There is no explanation submitted relating to this particular element of the claim apart from invoices and a document from an engineering firm commenting on the "Breakwater Design". This document is dated 1 March 1989. There is also submitted an invoice from Halcrow Consulting Engineers dated 9 July 1990 for services for an alternative breakwater design.

(f) Loss of insurance premiums

484. Van Oord seeks compensation relating to insurance premiums paid for a "contractor's all risk policy" and workman's compensation premiums paid. Van Oord seeks a refund of the portion of the premium it paid for the contractor's all risk policy for the period from 2 August 1990 to 4 February 1991. It had paid the premiums for the period from 4 February 1989 to 4 February 1991.

485. With respect to the workman's compensation, the premiums were paid from 2 February 1989 to 2 February 1991. Van Oord seeks compensation for the value of premium paid from 2 August 1990 to 2 February 1991.

2. Analysis and valuation

486. With respect to the claim for loss of contract files and head office costs, the Panel finds that Van Oord did not submit any evidence in support of its claim. Accordingly, the Panel recommends no compensation for the claims for loss of contract files and head office costs.

487. The damage survey costs were supported by invoices but Van Oord did not submit details of the work performed or sufficient explanations as to the basis of its claim. The Panel accordingly recommends no compensation. In support of the claim for legal costs, Van Oord submitted various invoices for lawyers' fees in the United Kingdom and Kuwait. The Panel has been wholly unable to relate that advice directly to Iraq's invasion and occupation of Kuwait.

488. The abortive design costs were supported by invoices and a report from an engineer. These costs appear to be properly classified as contract losses. In the absence of further explanations from Van Oord as to why this amount was not claimed against the employer or against the engineers who did the design that required further work, the Panel is unable to recommend compensation.

489. Van Oord submitted copies of payment for the insurance premiums and copies of the contract. However, Van Oord did not advance any argument as to why the relevant companies failed to refund them and whether the failure to refund was directly attributable to Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for insurance premiums.

3. Recommendation

490. The Panel recommends no compensation for other losses.

G. Summary of recommended compensation for Van Oord

Table 48. Recommended compensation for Van Oord

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	15,449,242	nil
Business transaction losses	1,620,844	nil
Loss of tangible property	983,785	96,714
Payment or relief to others	574,429	nil
Financial losses	9,008,689	nil
Other losses	773,277	nil
Total	28,410,266	96,714

491. Based on its findings regarding Van Oord's claim, the Panel recommends compensation in the amount of USD 96,714. The Panel finds the date of loss to be 2 August 1990.

XVI. FOLCRA S.A.

492. FOLCRA S.A. ("Folcra") is a company organized according to the laws of Spain. Folcra was undertaking three projects in Kuwait as a subcontractor to International Contractor's Group ("ICG"). ICG had entered into contracts with the Kuwait Institute for Scientific Research and Kuwait Foundation for the Advancement of Sciences. Folcra seeks compensation, with respect to two of the contracts, in the total amount of USD 190,581 (KWD 55,078) for contract losses.

Table 49. Folcra's claim

Claim element	Claim amount (USD)
Contract losses	190,581
Total	190,581

A. Contract losses

1. Facts and contentions

493. Folcra entered into three subcontracts with ICG. The two contracts with respect to which it seeks compensation are outlined below.

(a) Subcontract number one: Kuwait Institute for Scientific Research (aluminium works)

494. The subcontract was entered into between ICG and Folcra on 15 December 1982. ICG had entered into a contract with the Kuwait Institute for Scientific Research on 18 July 1982 for the construction of laboratories and administration buildings. Folcra was engaged to "supply, fix, and maintain of all aluminium works, glazing works, metal doors, louvres and screens". The subcontract price was stated as KWD 450,000.

(b) Subcontract number three: Kuwait Foundation for the Advancement of Sciences (metal works)

495. The subcontract was entered into between ICG and Folcra on 19 June 1983. ICG had entered into a contract with the New Kuwait Headquarters for Kuwait Foundation for Advancement of Sciences on 14 September 1982 for the construction of its headquarter buildings. Folcra was engaged to supply the metal works as specified in the second schedule of the contract. The contract price was stated as KWD 264,287.

2. Analysis and valuation

496. It would appear that work under the subcontracts was completed some time in 1988. The exact date is not clear. What is apparent is that a statement of final account was rendered for subcontract number one and subcontract number three on 21 April 1988 and 27 April 1988 respectively. An amount of KWD 36,772 was stated as outstanding relating to subcontract number one. With respect to subcontract number three, the amount outstanding is stated as KWD 28,309.

497. A letter from ICG dated 27 April 1988 indicates that the amounts outstanding were to be paid to Folcra by instalments within a six-month period commencing in May 1988. An amount of 5 per cent was to be withheld by ICG subject to a tax clearance from Folcra. Thereafter, there were several exchanges of correspondence between Folcra and ICG. A payment of an amount of KWD 16,000 was made on 21 December 1988 "following constant and persistent claims" by Folcra.

498. In a letter to the tax department dated 14 May 1990, Folcra refers to the amount outstanding to it from ICG as KWD 55,078. Folcra states that these debts could be regarded as a "doubtful" debt. In its letter to the Tax Department, Folcra contends that:

> "The balance of I.D. 55,078 should be considered as a loss due to the refusal of International Contracting Group to repay, even when the company proposed to submit an alternative guarantee to the Ministry of Finance."

499. Folcra stated in the letter to the tax authorities that the amount was owed since May 1988. Folcra submitted copies of the contracts, correspondence between itself and ICG and copies of correspondence with the Kuwait Tax Department.

500. Folcra contends that Iraq's invasion and occupation of Kuwait that prevented ICG from paying its liabilities.

> " The fact is when we were about to be paid by ICG, Iraq invaded and occupied Kuwait. Later, when the war was over, as the main managers and active partners of ICG were Palestinians all of them left Kuwait and ICG ceased its activities and so far we have not received any payment at all".

501. There is no proof submitted as to the debtor's inability to resume operations. The evidence submitted by Folcra indicates that the amounts had been outstanding as far back as May 1988. Indeed, in its letter to the Kuwaiti tax authorities dated 14 May 1990, Folcra indicates that the amounts in question were "doubtful" debts. It would appear that the cause of the failure to pay was not due directly to Iraq's invasion and occupation of Kuwait.

502. The Panel recommends no compensation as Folcra did not establish that the failure by ICG to pay was directly caused by Iraq's invasion and occupation of Kuwait.

3. Recommendation

503. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Folcra

Table 50. Recommended compensation for Folcra

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	190,581	nil
Total	190,581	nil

504. Based on its findings regarding Folcra's claim, the Panel recommends no compensation.

XVII. TURKISH JOINT VENTURE

505. Turkish Joint Venture ("TJV") is a legal entity existing under Turkish law, which at the time of Iraq's invasion and occupation of Kuwait was undertaking the Sabiya power station contract in Kuwait. TJV seeks compensation in the amount of USD 38,261,010 (KWD 11,057,432) for contract losses, loss of profits, payment or relief to others, other losses and interest.

506. In response to a request for further information in accordance with article 34 of the Rules, TJV reduced its claim from USD 67,894,121 to USD 38,261,010.

507. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to TJV's claim for interest.

Table 51. TJV's claim

Claim element	Claim amount (USD)
Contract losses	10,044,194
Loss of profits	26,695,502
Payment or relief to others	695,439
Other losses	825,875
Total	38,261,010

A. Contract losses

1. Facts and contentions

508. TJV is a joint venture formed with the involvement of five Turkish companies, consisting of: BMB A.S., SOYTEK A.S., SOYUT A.S., YAPI MERKEZI A.S., and GURIS A.S. The joint venture was formed to execute the Sabiya Power station contract (the "contract"). The contract was signed on 17 February 1990 with the Ministry of Electricity and Water of Kuwait ("MEW"). The contract price was fixed as KWD 104,894,959.

509. The contract was for the provision of civil, structural, architectural and miscellaneous works. Sabiya power station was to be built at a site in northern Kuwait close to Bubiyan Island, adjacent to the Iraq-Kuwait border. The contract period was to be for 5.5 years and was scheduled for completion, according to TJV, on 1 July 1995.

510. TJV asserts that from the period it made its offer in November 1989 until the award of the contract in February 1990, it incurred expenses in Kuwait and Turkey. Upon the award of the contract, TJV began mobilisation for the performance of the contract. It established a project head office in Kuwait City, and as at August 1990, it had about 140 staff members based at its head office.

511. At the project site, various facilities and workshops were constructed. The facilities included a site laboratory and office. TJV also leased a labour camp and constructed temporary housing, ablution and kitchen facilities. TJV states that it also engaged various subcontractors.

512. TJV alleges that when Iraq invaded and occupied Kuwait on 2 August 1990, Iraqi forces arrested the management at the site, a number of whom were taken to Iraq to be held as "human shields" and that the remainder of the workers fled Kuwait via Iraq and Jordan. TJV further asserts that the invading Iraqi forces destroyed or damaged its property and facilities at the project site and in Kuwait City. TJV states that due to the presence of land mines on the site, it was largely inaccessible until 1994.

513. TJV seeks compensation as follows:

(a) Time period 1: Pre-contract period

514. TJV seeks compensation for KWD 1,217,438 for pre contract expenses for the period up to 17 February 1990. In its response to the Panel's request for further information, TJV reduced its claim to KWD 918,071. These asserted costs include: pre-bid expenses owing to various entities, staff salaries relating to bid expenses, legal fees, design fees, advisory fees and "per. bond expenses"

(b) Time period 2: Works executed as at 2 August 1990

515. TJV seeks compensation for KWD 3,030,845 for asserted "costs incurred" on the contract from 2 February 1990 to 2 August 1990. This claim was revised to KWD 2,663,397 in TJV's reply to the article 34 notification. In response to this request for further information, TJV reduced the claimed amount to KWD 1,984,701. Its submission also contained asserted losses as outlined in table 52, infra:

Table 52. TJV's claim for contract losses (work executed to 2 August 1990)

Claim item	Description	Original claim (KWD)	Amounts claimed in response to article 34 notification (KWD)	Amounts claimed in response to Panel's request for further information (KWD)
Salaries and wages	Salary advances, travel expenses and attendance fees	206,803	207,540	206,922
Materials	Construction materials, pipes, equipment, furniture and electrical accessories	389,344	383,927	98,862
Subcontractors	Supply of prefabricated houses, design work, transport and earthwork	463,590	408,245	82,831
Rent	House, equipment and office	64,021	56,854	36,974
Sponsorship and consultancy services	Sponsor fee, legal fee, financial, advisors, business advisors, insurance consultants	1,370,752	1,370,752	1,300,548
Tender preparation		128,530	5,000	5,000
Insurance	Car insurance, and contractor's all risk	95,799	38,799	38,800
Telephone and communication expenses	Telephone, fax, electricity, advertising and post office costs	25,037	25,037	19,413
Land rent		176,365	115,000	100
Engineering and other costs	Books, office electrical equipment, surveying equipment, office and furniture	129,674	88,168	88,148
Travel expenses	Airline tickets, hotel expenses, taxi fares, exit taxes and visas	50,420	40,847	32,518
Others	Food, household goods, kitchen equipment, gasoline, oil, water and attestation fees	14,209	14,209	14,166
Turkish office costs	Salaries, wages, travel, hotel accommodation, food, rental, car rental, and stationary	140,780	60,419	60,419
Total				1,984,701

(c) Withdrawal of claims

516. In its reply to the article 34 notification, TJV identifies certain claims that it had originally submitted and is withdrawing. These claims include the letters of credit claim (KWD 9,214) and the

bank guarantee commission claim (KWD 848,184). The Panel notes that TJV has withdrawn the letters of credit claim and the bank guarantee commission claim and acknowledges the withdrawal of the claim.

2. Analysis and valuation

517. In support of its claim, TJV submitted the contract and approved variations as well as contract conditions (both general and particular).

(a) Time period 1: Pre-contract period

518. With respect to the pre-contract period claim, TJV submitted detailed evidence consisting of letters of guarantee from 1989 for the tender, bank debits made in December 1989 and 22 February 1990 for payment of the guarantee and copies of various TJV Board resolutions relating to payments for the tender.

519. The Panel finds that TJV had been awarded the contract and had expended a significant amount of time and money in its bid for the contract. This Panel, in its previous decisions, has concluded that bid costs are generally recovered through the payments under the contract for work done. The Panel finds that the contract was primarily in the mobilisation phase at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990. If the contract had proceeded as anticipated, TJV would have expected to recover its bid costs over the duration of the contract. The Panel finds that Iraq's invasion and occupation of Kuwait was the direct cause of the project collapsing and the consequent failure of TJV to recover its bid costs.

520. Accordingly, the Panel considers this item as recoverable in principle. Based on the evidence submitted by TJV the Panel recommends compensation in the amount of KWD 918,071.

(b) Time period 2: Works executed up to 2 August 1990

521. The evidence submitted by TJV in support of its claim consisted of receipts and invoices for various items including: office supplies, air conditioning, air tickets, fuel, salary advances, rental deposits, orders for bricks, plywood, steel bars, construction equipment, air conditioning units, telephones and the like.

522. TJV submitted various agreements with subcontractors, purchase orders and correspondence with subcontractors. TJV submitted its payroll for January 1990 to July 1990.

523. TJV places reliance for its claim on the "Special Risks" clauses of the contract with MEW. In particular, it relies on Article 3.10.14 of the contract which deals with the issue of special risks. Article 3.10.14 defines the "special risks" and this includes "war hostilities, invasion, revolution, rebellion. . ." TJV states that the invasion of Kuwait by Iraq and the associated losses constituted a "Special Risk" under the contract.

524. TJV states that the contract provides that in the event of the outbreak of war, MEW has the option to terminate the contract, but if it does not do so then TJV has the obligation to "use his best

endeavours to complete the execution of the work" (article 3.10.14.5). TJV contends that in accordance with the "Special Risks" clause of the contract it was entitled to be compensated as follows:

(i) Losses damages and claims of subcontractors and suppliers.

(ii) Damage to the works or temporary works.

(iii) Payment for any work done and materials destroyed.

(iv) Increased costs arising from "Special Risks".

525. It would appear that the contract was eventually terminated. According to TJV, the termination occurred on or about 12 July 1993. TJV, in its article 34 notification response, states that notwithstanding several meetings with MEW, they were unable to agree as to the terms of the resumption of the contract and therefore the contract was terminated.

526. In an effort to mitigate its damages, TJV states that it diligently sought settlement and compensation from MEW and the project banks. On 1 July 1995, TJV and MEW reached a settlement of project claims which resulted in the execution of a joint "Progress Payment Certificate of War Losses of TJV".

527. MEW withdrew the advance payment made to TJV as part of the settlement. As a consequence, TJV states that no payments were made to it under the contract. MEW states that it is not liable to pay any of the amounts under the contract to TJV as this is the liability of Iraq. MEW did agree to an orderly close down of the project, "and a careful examination and certification of TJV's (uncompensated) work progress, costs, expenses, overheads and lost profit". The settlement with MEW also allowed the termination of the relationship with the banks and for TJV to terminate its ongoing exposure to the project guarantees.

528. The contract itself provides for payment if it is terminated because of the "Special Risks". Article 3.10. 14. 6 provides that the contractor will be entitled to be paid by the owner "for all work executed prior to the date of termination and at the rates and prices provided in the contract." Additional compensation is provided for the cost of goods or materials ordered by the contractor.

529. In the case of some of the projects in which claimants are seeking compensation from the Commission, there have been proceedings between the parties to the project contract, leading to an award or a judgment; or there has been a settlement between the claimant and the other party to the project contract. In all such cases, the concerned is with finality. The award, judgment or settlement must be final – not subject to appeal or revision.

530. The claim that is then raised with the Commission is either for sums said not to have been included in an award, judgment or settlement.

531. It follows that it will be a prerequisite to establish that that is in fact the case, namely that, for some reason, the claim resulting in the award, judgment or settlement did not raise or resolve the

subject matter of the claim being put before the Commission. Sufficient evidence of this will be needed. The absence of an identifiable element in the award, judgment or settlement relating to the claim before the Commission does not necessarily mean that that it has not been addressed. The Tribunal that issued the award or judgment or the parties that concluded the settlement may have reached a single sum to cover a number of claims; or the Tribunal may have considered that the claim was not maintainable. Equally, the claim may have been abandoned in, and as part of the settlement. In either event it would appear that the claim has been resolved and there is no loss left to be compensated. At that stage, it will be necessary to review the file to see if there is any special circumstance or material that would displace this initial conclusion. Absent such circumstance or material, no loss is established. Sufficient evidence of an existing loss is essential if a Panel is to recommend compensation.

532. If, on the other hand, it is clear that the particular claim has not been adjudicated or settled, then it may be entertained by the Commission.

533. The settlement between MEW and TJV confirms that pursuant to the terms of the contract, no progress payments were made to TJV. Further, the settlement terms also indicate that the settlement was entered into with the expectation that TJV would submit its claim to the Commission. MEW, in the settlement confirms that it will not seek compensation for the items for which TJV is claiming for. Accordingly, the Panel finds that TJV's claim is properly before the Commission.

534. Part of the settlement terms between MEW and TJV was that MEW stated that it assigned its rights to the claim it may have had against Iraq to TJV.

535. From time to time, it appears that claims have been assigned between the parties and it is the assignee that is claiming. In principle, there is no objection to such assignments, provided the assignment is properly evidenced and the Commission can satisfy itself that the claim is not also being advanced by the assignor. However, the assignee is not thereby released from the necessity to prove the claim as fully as the assignor is required to have done.

536. The Panel finds that there has been a valid assignment of MEW's potential claim against Iraq to TJV. MEW's potential claim might well have included a number of elements, of which only one would have been its liability to TJV. However, the only element which TJV has put before the Commission is the TJV claim. In order for TJV to succeed in its claim before the Commission it would need to establish that the losses that it incurred arose as a direct result of Iraq's invasion and occupation of Kuwait. Further, TJV would need to establish that MEW would have been liable to it for such losses.

537. The Panel finds that Iraq's invasion and occupation of Kuwait caused the destruction of the project site. Further, the project site was mined which rendered it inaccessible until 1994. The Panel finds that these actions of Iraq directly resulted in the collapse of the project and resultant losses. In terms of the Special Risks clauses of the contract, the Panel finds that MEW would have been liable to TJV for such losses. MEW, in turn, would have had a claim against Iraq for these potential losses.

The Panel finds that as MEW has validly assigned its rights to seeks compensation against Iraq to TJV, the rights to claim for such losses lies with TJV.

538. It follows from the immediately preceding paragraphs that the Panel finds that TJV is entitled in principle to bring this claim before the Commission. The Panel finds that the evidence submitted by TJV established a loss of KWD 1,837,211.

3. Recommendation

539. The Panel recommends compensation in the amount of USD 9,533,848 for the claims for contract loss.

B. Loss of profits

1. Facts and contentions

540. TJV seeks compensation for KWD 7,715,000 for loss of profit. In its original submission to the Commission, TJV sought compensation for KWD 1,451,116 for loss of overhead and KWD 10,945,560 for loss of profits. In its reply to the article 34 notification, TJV sought to increase its loss of overhead claim to KWD 3,030,448 and its loss of profits claim to KWD 12,587,395. In TJV's response to the request for further information, it has withdrawn its claim for overhead and reduced its claim for loss of profits to KWD 7,715,000.

541. TJV states that the contract price included the amounts of 3 per cent and 12 per cent for head office contribution and profit respectively. These amounts were applied to the total contract sum of KWD 104,894,959.430 to arrive at the claimed amounts.

542. The claim for the loss of profit was initially calculated by TJV as follows:

91, 213,008.2 x 12 % = KWD 10,945,561

543. The loss of profits claim calculation was revised by TJV in its reply to the request for further information, and was calculated using a return of about 7. 35 per cent.

2. Analysis and valuation

544. TJV submitted evidence to establish the existence of its contractual relationship with MEW at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990.

545. Further, it is evident that the continuation of the relationship was disrupted by Iraq's invasion and occupation of Kuwait. The issue is whether TJV demonstrated that the contract would have been profitable as a whole.

546. TJV's contention was that, in terms of its tender for the project, and more specifically, in terms of its unit rate analysis, it had used an average overhead and loss of profits of 20 per cent. In support of this proposition, TJV submitted a copy of the tender documents containing the unit rate analysis, which contain a column with the amount of the anticipated overhead and profit margin. Further, TJV

places reliance on the settlement that it reached with MEW entitled "Progress Payment Certificate of War Losses of TJV" where MEW states what it considers to be the achievable overhead and loss of profit. At page 3 of that document, MEW indicates that the total value of the overhead and loss of profit was 16.7 per cent of the contract value. This assertion is based on the unit price details contained in the tender.

547. MEW further indicates that:

> "It is customary and usual practice in Kuwait that the expenses of Main Office are deemed to exist up to 3.5 % of the contract value. In this case, the MEW considers reasonable these expenses based on 3% of the contract value instead of the 4.67% requested by TJV from the commencement until contract termination date. It is clear that these Head Office expenses continued notwithstanding the contract interruption caused by the war. It is reasonable to calculate net profit at 7% of the contract value instead of the 12 % as requested by the TJV for the period between the date of commencement and date of contract termination instead of the full duration of the contract as requested by TJV."

548. TJV's contentions are based primarily upon its tender documentation and the support of MEW that it would have been entitled to payment for overhead and profit. There still, however, remains the issue as to whether the project would have been profitable as a whole.

549. TJV concedes that as the project was at mobilisation stage "there was no detailed budget to compare with tender stage estimations". TJV submitted calculations relating to "available information". TJV also based its calculations for the loss of profits claim on work it had done at the mobilisation phase of the contract. TJV submitted a detailed calculation in its response to the request for further information. TJV acknowledges that the "concept of ongoing profitability cannot be applicable to TJV case by calculation of revenue/expense comparison, since the execution of the works had just started when the war took place and naturally TJV was working to set-up contracting facilities, and other initial preparatory works in expectation of recovery of theses expenses out of revenues of the work to be executed in the future."

550. TJV stated that the additional information was to demonstrate its price strategy during the tender phase, to prove the accuracy of the pricing and to demonstrate its risk margins.

551. TJV submitted audited financial statements for the individual partner companies in the joint venture for 1991 and 1992, audited financial statements for TJV for the periods 1992, 1993 and 1994, monthly reports for TJV for the periods May to July 1990, a status report of July 1990, a unit rate analysis and bill of quantities. Additional documentation in the form of the tender build up were submitted in the response to the request for further information.

552. The Panel finds that as TJV was formed specifically for the Sabiya power station project, there were no previous accounts available to utilise for comparative purposes. The profitability of the individual partners cannot be used as a reliable guide as to the future performance of the joint venture.

Further, profitability of the enabling works in a design and build project is not an acceptable indication that all future works would be similarly profitable.

553. The Panel considers that as the project was at such an early stage, there was insufficient evidence to establish any realistic indications of the profitability of the project overall. A number of the calculations submitted by TJV were theoretical and were difficult to verify independently.

554. Accordingly, the Panel finds that TJV failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary.

3. Recommendation

555. The Panel recommends no compensation for loss of profits.

C. Payment or relief to others

1. Facts and contentions

(a) Time period 3: 2 August 1990 to 2 March 1991

556. TJV seeks compensation in the amount of USD 695,439.

557. TJV in its original submission sought compensation for KWD 914,623 for the period 2 August 1990 to 2 March 1991. In its reply to the article 34 notification, the claim was reduced to KWD 200,982. The revised amount related to "waiting of 43 engineers and staff". The amount claimed is salary for six months.

2. Analysis and valuation

558. TJV provided a schedule of its employees containing their names, basic salary and title. TJV did not submit the Kuwaiti civil identification number and passport number with issuing country for its employees.

559. TJV stated, in long hand, on the schedule of its staff, that the amounts were "not paid, shall be paid to each person if remunerated by UNCC and indicated accordingly." In view of the fact that TJV did not make the payments, no loss has been established.

3. Recommendation

560. The Panel recommends no compensation for the claim for payment or relief to others as TJV has not established a loss.

D. "Other losses"

561. TJV seeks compensation in the amount of USD 825,875 for other losses. The claim is for (a) restoration costs (KWD 223,615), and (b) additional expenses (KWD 15,063).

(a) Time period 4: up to December 1992 Restoration

562. TJV initially sought compensation for an amount of KWD 1,088,779. In its reply to the article 34 notification, this amount was reduced to KWD 406,300. The final claim amount sought is not clear. In its reply to the article 34 notification, certain claim elements were indicated as having been compensated by MEW, while certain additional invoices were submitted.

563. In its response to the request for further information, TJV reduced this claim to KWD 223,615.

564. The remaining claim elements would appear to consist of the following:

(b) Restoration costs

565. TJV's claim for restoration costs are detailed in table 53, infra.

Table 53. TJV's claim for other losses (time period 4: up to December 1992)

Claim item	Claim amount (KWD)
Phone bill – Ministry of Communication, Kuwait, 1991	331
Expenses - Mehmet Gomustag	230
Tasoron Hakedisi	710
Legal fees -	134,461
Legal fees/tax payment-Ernest	56,858
Q.S. Fees	1,000
Audit fees-Coopers and Lybrand	2,966
Claim preparation costs	27,059
Total	223,615

566. In support of these loss elements, TJV submitted various receipts vouchers, correspondence and agreements. The Panel found that whilst TJV did seek to support this loss element with documentation, it did not submit adequate explanations relating to each specific loss item in order for the Panel to determine the nature of the claim and whether TJV was entitled to compensation.

567. With respect to the claim for claim preparation costs, in its reply to the article 34 notification, TJV submitted a claim for claim preparation costs for an amount of KWD 27,059. This related to an agreement that it entered into with Gorkem Instaat Limited to assist in its claim preparation. The agreement is dated 30 March 2000. Payment was to be an amount of USD 92,000. The payments were to be made on the basis of 20 per cent in advance and 80 per cent upon completion. The works were scheduled to be completed on 15 June 2000. The Panel finds that the claim for preparation costs

is an additional loss item claimed by TJV. Applying the approach to amendment of claims after filing contained in paragraphs 35 to 37 of the Summary, the Panel does not take into consideration the claim for claim preparation costs.

568. The Panel recommends no compensation for restoration costs.

(c) "Ascertained creditors"

569. TJV had initially claimed an amount of KWD 722,336 for asserted losses relating to "ascertained creditors". In its reply to the article 34 notification, TJV indicated that the "[w]e have eliminated a number of ascertained creditors as give in the 1st submittal and we have integrated the justifiable and/or paid ones into the corresponding time period expenses." The Panel accordingly finds that TJV has withdrawn this particular loss item.

(d) "Additional expenses"

570. TJV sought compensation in the amount of KWD 187,000. In its response to the request for further information, TJV indicated that the claim had been reduced to KWD 15,063. The claims relate to the time periods 1, 2 and 3. TJV submitted spreadsheets identifying in excess of 120 items relating to this claim. TJV also submitted receipts and translations in support of its claim.

571. The Panel finds that TJV submitted sufficient evidence to demonstrate its loss and recommends compensation in the amount of USD 52,121 (KWD 15,063).

Table 54. Recommended compensation for TJV

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	10,044,194	9,533,848
Loss of profits	26,695,502	nil
Payment or relief to others	695,439	nil
Other losses	825,575	52,121
Total	38,261,010	9,585,969

E. Recommended compensation for TJV

572. Based on its findings regarding TJV's claim, the Panel recommends compensation in the amount of USD 9,585,969. The Panel finds the date of loss to be 2 August 1990.

XVIII. MERZ AND MCLELLAN LIMITED

573. Merz and McLellan Limited ("Merz"), is an entity incorporated according to the laws of the United Kingdom. It provides services as international consulting engineers. Merz seeks compensation in the total amount of USD 623,173 (327,789 Pounds sterling (GBP)) for contract losses, payment or relief to others, claim preparation costs and interest.

574. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Merz' claim for interest.

Table 55. Merz' claim

Claim element	Claim amount (USD)
Contract losses	161,190
Payment or relief to others	145,036
Other losses (claim preparation costs)	49,738
Interest	267,209
Total	623,173

A. Contract losses

1. Facts and contentions

575. Merz seeks compensation in the amount of USD 161,190 for contract losses.

576. Merz entered into a contract with the Kuwait Ministry of Electricity and Water ("MEW") (the "employer") on 14 May 1988 (MEW/C//1934-87/88). Merz was to provide consulting engineering services with respect to the construction of a thermal power station at Sabiya. Sabiya is approximately 100 kilometres north of Kuwait City. The estimated overall cost of construction of the power station was GBP 1,000 million.

577. For its services, Merz was to be paid an amount of KWD 2,416,665 relating to work in connection with the contract and an amount of KWD 4,817,782 for "expatriate site supervisory staff". Merz' duties involved providing consulting engineering services for a "2400 MW thermal power station with eight steam turbine units, a 60 MW gas turbine unit, and facilities to enable the future construction of two distillation plants". According to Merz, the status of the contract as at 2 August 1990 was as follows:

(a) The main plant contract was awarded to Mitsubishi Heavy Industries in a contract dated 6 March 1989;

(b) The civil and building work was awarded to Turkish Joint Venture in a contract dated 17 February 1990; and

(c) Fuel and water storage tanks was awarded to Cekop in a contract dated 17 June 1990.

578. Contracts were "about to be awarded" for offshore works to Gulf Dredging and the fuel oil and gas system supply to Conco. Merz states that tender documents were being prepared by them for work relating to gas turbines, security and surveillance system and workshop equipment.

579. Merz' design staff in the United Kingdom were involved in the preparation of drawings and specifications for submission to the employer and also checking the drawings of the contractors. Merz states that it had its engineers in Kuwait since August 1988 as they were involved in co-ordination work in Kuwait. Its civil and engineering staff were supervising work by the civil and building contractor, who commenced work on the site on 28 June 1990.

580. Merz states that Iraq's invasion and occupation of Kuwait on 2 August 1990 resulted in an immediate termination of the work on the Sabiya project site. Its staff members in Kuwait ceased work when the project offices were struck by artillery fire. The staff at its office in Newcastle, United Kingdom, ceased working on the project on 10 August 1990. Thereafter, (from 13 August 1990) Merz asserts that work on the project related to "running down work, completing status reports and storing records for future retrieval".

581. Merz asserts losses relating to "demobilisation". These are the costs which Merz asserts that it incurred from Monday 13 August 1990 relating to closing down work, completing status work, and storing records for retrieval in the event of the project recommencing. The final date for which the costs are claimed is not clear. The costs are summarised below.

(a) Civil engineering costs (Newcastle)

582. Merz asserts that its architectural staff were working on design drawings for the turbine house, electrical control building and the administration building. Its structural engineering staff were preparing calculations and design drawings for the turbine house steelwork, and the civil engineering staff were preparing calculations for the turbine house, boiler foundations, cooling water system and cable tunnels. Merz asserts that its staff spent 2,004.75 hours on these tasks and therefore incurred a cost of GBP 60,283 (USD 114,606).

(b) Mechanical and electrical engineering costs (Newcastle)

583. Merz states that the members of its mechanical and electrical engineering staff were involved in auditing calculations and design drawings submitted by Mitsubishi Heavy Industries, the contractor for the boilers and turbines. Merz asserts that they spent 224.5 hours at a cost of GBP 6,578 (USD 12,506).

(c) General costs (Newcastle)

584. Merz states that its staff were engaged in liaison work with the employer and the various contractors. The demobilisation costs for the Newcastle office amounted to GBP 17,925 (USD 34,078) based on 502.50 hours.

(d) Demobilisation costs - Kuwait

585. Merz states that its staff in Kuwait spent 3,775.50 hours at a cost of GBP 70,733 (USD 134,473). Its staff in Kuwait had provided supervisory staff and site co-ordinators for the employer. Merz also seeks compensation for expenses incurred by its expatriate staff in Kuwait totalling KWD 5,556 (USD 10,564). These claims appear to be claims more properly classified as a claim for payment or relief to others. The Panel accordingly reclassifies them as such.

586. According to Merz, this claim for compensation does not include any claim for profit, loss of income or loss of recovery of future overheads and profit. Merz confirms that after the liberation of Kuwait it did receive payment from the employer for work completed to 2 August 1990 and which were due for payment. The contract was resumed and completed after cessation of hostilities. The new contract agreement with the employer was dated 6 October 1993.

2. Analysis and valuation

587. Merz contends that Iraq's invasion and occupation of Kuwait resulted in the contract being frustrated. It advised the employer of the frustration of the contract in a letter that it sent to the Kuwait Embassy in London dated 20 August 1990. Merz asserts that it used its "best endeavours" to minimise the consequential damages and accordingly placed a "moratorium" on further work on 10 August 1990.

588. With respect to the issue of termination due to frustration, the 20 August 1990 letter sent by Merz to the employer refers to clause 17.3 of the contract. Clause 17.3 entitles it to payment "taking into consideration the services before postponement, cancellation or alteration of the works." These amounts have been paid. It is the "demobilisation" claim that has not been paid.

589. The contract is silent on the issue of "demobilisation" payments. It would appear that Merz has exhausted its remedies with the employer in that it has received payment for work performed and indeed has sought to mitigate its losses by resuming the contract with the employer. It seeks compensation from the Commission for those aspects of its work where there was no value to the employer in terms of the contract.

590. In support of its claim, Merz submitted a copy of its contract with the employer, diary sheets for the United Kingdom and Kuwait office, its annual accounts from December 1989 to December 1992 and a summary schedule of the employees and hours worked.

591. The diary sheets indicate the project and time spent per day on it. It is not possible to tell exactly what work was being done in relation to a particular project. Nor is it possible to verify whether the work being undertaken was indeed for the "demobilisation" as asserted by Merz. It raises the issue as to whether the time charged was reasonable for the asserted work.

592. A detailed breakdown of amounts recovered from the employer is not submitted. It is, therefore, not possible to say whether the amounts claimed for have not been compensated or alternatively incorporated into the new contract.

593. The Panel finds that whilst Merz did establish a causal link for the claim with Iraq's invasion and occupation of Kuwait, it is not possible, from the evidence submitted to accurately verify that the diary sheets, on their own, establish that work was performed on the "demobilisation" and, if so, to what extent. Accordingly, the Panel is unable to recommend compensation for demobilisation costs.

3. Recommendation

594. The Panel recommends no compensation for contract losses.

B. Payment or relief to others

1. Facts and contentions

595. Merz seeks compensation in the amount of GBP 76,289 for payment or relief to others.

596. Merz originally claimed these costs as part of its claim for demobilisation in Kuwait (GBP 70,733), but a number of these costs appear to be more appropriately classified as payment or relief to others relating to its staff in Kuwait. The asserted losses include claims for periods where the employees were held hostage, and also claims for a period during which they were recuperating.

597. Merz also seeks compensation for expenses incurred relating to its expatriate staff totalling GBP 5,556. This includes the cost of hotel bills and the like. It also includes the cost of the funeral of one of its employees who died whilst being held hostage in Iraq.

2. Analysis and valuation

598. In support of its claim, Merz provided its internal expense sheets and diaries. Copies of invoices for hotel expenses and car hire have been submitted for one employee. The Panel recommends compensation for GBP 516.15 and GBP 83.00 as Merz submitted sufficient evidence of the expense.

599. An invoice has been submitted which coincides with the amount claimed for the funeral cost. Merz also submitted a copy of a newspaper cutting confirming the death of its employee. The Panel recommends compensation for GBP 1,351 for the funeral cost of the Merz employee.

600. With respect to the balance of the claim for payment or relief to others, the Panel recommends no compensation as Merz did not submit sufficient evidence to establish a loss.

3. Recommendation

601. The Panel recommends compensation in the amount of USD 3,707 for payment or relief to others.

C. Claim preparation costs

602. Merz seeks compensation for claim preparation costs of USD 49,738 (GBP 26,162.42) for its manpower time spent on the preparation of the claim. Applying the approach taken with respect to

claim preparation costs set out in paragraph 60 of the Summary, the Panel makes no recommendation with respect to claim preparation costs.

D. Recommended compensation for Merz

Table 56. Recommended compensation for Merz

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	161,190	nil
Payment or relief to others	145,036	3,707
Other losses (claim preparation costs)	49,738	- -
Interest	267,209	- -
Total	623,173	3,707

603. Based on its findings regarding Merz' claim, the Panel recommends compensation in the amount of USD 3,707. The Panel finds the date of loss to be 2 August 1990.

XIX. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT

Table 57. Recommended compensation for the sixteenth instalment

Claimant	Claim amount (USD)	Recommended compensation (USD)
China Hebei International Economic and Technical Co-operation Corporation	326,879	207,065
China Jiangsu International Economic and Technical Co-operation Corporation	13,575,213	2,980,686
China Zhejiang Corporation for International Economic and Technical Co-operation	16,678,917	607,586
Lavcevic d.d. Split	57,819,374	128,977
Construction Social Company "Primorje"	25,070,347	212,120
Babcock Entreprise	678,125	nil
Beicip-Franlab	187,928	nil
Cegelec	21,532,440	nil
Cogelex Alsthom	1,614,391	nil
Larsen & Toubro Limited	20,039,525	1,974
Hitachi Zosen Corporation	411,404	nil
Ashco International Corporation	31,420,807	nil
Construction Company Pelagonija	1,079,859	25,907
Van Oord International B.V.	28,410,266	96,714
Folcra S.A.	190,581	nil
Turkish Joint Venture (TJV)	38,261,010	9,585,969
Merz and McLellan Limited	623,173	3,707

Geneva, 21 June 2001

(Signed) John Tackaberry
Chairman

(Signed) Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner

Annex

SUMMARY OF GENERAL PROPOSITIONS

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Introduction

1. In the Report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E3" claims (S/AC.26/1999/14) (the "Fourth Report"), this Panel set out some general propositions based on those claims which had come before it and the findings of other panels of Commissioners contained in their reports and recommendations. Those propositions, as well as some observations specific to the claims in the fourth instalment of "E3" claims, are to be found in the introduction to the Fourth Report (the "Preamble").

2. The Fourth Report was approved by the Governing Council in its decision 74 (S/AC.26/Dec.74 (1999)); and the claims that this Panel has subsequently encountered continue to manifest the same or similar issues. Accordingly, the Panel has revised the preamble, so as to delete the specific comments, and thus present this Summary of general propositions (the "Summary"). The Summary is intended to be annexed to, and to form part of, the reports and recommendations made by this Panel. The Summary should facilitate the drafting, and reduce the size, of this Panel's future reports, since it will not be necessary to set matters out in extenso in the body of each report.

3. As further issues are resolved, they may be added at the end of future editions of this Summary.

4. In this Summary, the Panel wishes to record:

(a) The procedure involved in evaluating the claims put before it and in formulating recommendations for the consideration of the Governing Council; and

(b) Its analyses of the recurrent substantive issues that arise in claims before the Commission relating to construction and engineering contracts.

5. In deciding to draft this Summary in a format which was separated out from the actual recommendations in the report itself, and in a way that was re-usable, the Panel was motivated by a number of matters. One was the desire to keep the substantive element of its reports to a manageable length. As the number of reports generated by the various panels increases, there seems to be a good deal to be said for what might be called economies of scale. Another matter was the awareness of the Panel of the high costs involved in translating official documents from their original language into each official language of the United Nations. The Panel is concerned to avoid the heavy costs of re-translation of recurrent texts, where the Panel is applying established principles to fresh claims. That re-translation would occur if the reasoning set out in this Summary had been incorporated into the principal text of each report at each relevant point. And, of course, that very repetition of principles seems unnecessary in itself, and this Summary avoids it. In sum, it is the intention of the Panel to shorten those reports and recommendations, wherever possible, and thereby to reduce the cost of translating them.

I. THE PROCEDURE

A. Summary of the process

6. Each of the claimants whose claims are presented to this Panel is given the opportunity to provide the Panel with information and documentation concerning the claims. In its review of the claims, the Panel considers evidence from the claimants and the responses of Governments to the reports of the Executive Secretary issued pursuant to article 16 of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules"). The Panel has retained consultants with expertise in valuation and in construction and engineering. The Panel has taken note of certain findings by other panels, approved by the Governing Council, regarding the interpretation of relevant Security Council resolutions and Governing Council decisions. The Panel is mindful of its function to provide an element of due process in the review of claims filed with the Commission. Finally, the Panel expounds in this Summary both procedural and substantive aspects of the process of formulating recommendations in its consideration of the individual claims.

B. The nature and purpose of the proceedings

7. The status and functions of the Commission are set forth in the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) dated 2 May 1991 (S/22559).

8. The Panel is entrusted with three tasks in its proceedings. First, the Panel is required to determine whether the various types of losses alleged by the claimants are within the jurisdiction of the Commission, i.e., whether the losses were caused directly by Iraq's invasion and occupation of Kuwait. Second, the Panel has to verify whether the alleged losses that are in principle compensable have in fact been incurred by a given claimant. Third, the Panel is required to determine whether these compensable losses were incurred in the amounts claimed, and if not, the appropriate quantum for the loss based on the evidence before the Panel.

9. In fulfilling these tasks, the Panel considers that the vast number of claims before the Commission and the time limits in the Rules necessitate the use of an approach which is itself unique, but the principal characteristics of which are rooted in generally accepted procedures for claim determination, both domestic and international. It involves the employment of well established general legal standards of proof and valuation methods that have much experience behind them. The resultant process is essentially documentary rather than oral, and inquisitorial rather than adversarial. This method both realises and balances the twin objectives of speed and accuracy. It also permits the efficient resolution of the thousands of claims filed by corporations with the Commission.

C. The procedural history of the "E3" Claims

10. The claims submitted to the Panel are selected by the secretariat of the Commission from among the construction and engineering claims (the ""E3" Claims") on the basis of established criteria. These include the date of filing and compliance by claimants with the requirements established for claims submitted by corporations and other legal entities (the "category "E" claims").

11. Prior to presenting each instalment of claims to the Panel, the secretariat performs a preliminary assessment of each claim included in a particular instalment in order to determine whether the claim meets the formal requirements established by the Governing Council in article 14 of the Rules.

12. Article 14 of the Rules sets forth the formal requirements for claims submitted by corporations and other legal entities. These claimants must submit:

(a) An "E" claim form with four copies in English or with an English translation;

(b) Evidence of the amount, type and causes of losses;

(c) An affirmation by the Government that, to the best of its knowledge, the claimant is incorporated in or organized under the law of the Government submitting the claim;

(d) Documents evidencing the name, address and place of incorporation or organization of the claimant;

(e) Evidence that the claimant was, on the date on which the claim arose, incorporated or organized under the law of the Government which has submitted the claim;

(f) A general description of the legal structure of the claimant; and

(g) An affirmation by the authorized official for the claimant that the information contained in the claim is correct.

13. Additionally, the "E" claim form requires that a claimant submit with its claim a separate statement in English explaining its claim ("Statement of Claim"), supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed losses. The following particulars are requested in the "INSTRUCTIONS FOR CLAIMANTS":

(a) The date, type and basis of the Commission's jurisdiction for each element of loss;

(b) The facts supporting the claim;

(c) The legal basis for each element of the claim; and

(d) The amount of compensation sought and an explanation of how the amount was calculated.

14. If it is determined that a claim does not provide these particulars or does not include a Statement of Claim, the claimant is notified of the deficiencies and invited to provide the necessary information pursuant to article 15 of the Rules (the "article 15 notification"). If a claimant fails to respond to that notification, the claimant is sent a formal article 15 notification.

15. Further, a review of the legal and evidentiary basis of each claim identifies specific questions as to the evidentiary support for the alleged losses. It also highlights areas of the claim in which further information or documentation is required. Consequently, questions and requests for additional documentation are transmitted to the claimants pursuant to article 34 of the Rules (the "article 34

notification"). If a claimant fails to respond to the article 34 notification, a reminder notification is sent to the claimant. Upon receipt of the responses and additional documentation, a detailed factual and legal analysis of each claim is conducted. Communications with claimants are made through their respective governments.

16. It is the experience of the Panel in the claims reviewed by it to date that this analysis usually brings to light the fact that many claimants lodge little material of a genuinely probative nature when they initially file their claims. It also appears that many claimants do not retain clearly relevant documentation and are unable to provide it when asked for it. Indeed, some claimants destroy documents in the course of a normal administrative process without distinguishing between documents with no long term purpose and documents necessary to support the claims that they have put forward. Some claimants carry this to the extreme of having to ask the Commission, when responding to an article 15 or an article 34 notification, for a copy of their own claim. Finally, some claimants do not respond to requests for further information and evidence. The consequence is inevitably that for a large number of loss elements and a smaller number of claimants the Panel is unable to recommend any compensation.

17. The Panel performs a thorough and detailed factual and legal review of the claims. The Panel assumes an investigative role that goes beyond reliance merely on information and argument supplied with the claims as presented. After a review of the relevant information and documentation, the Panel makes initial determinations as to the compensability of the loss elements of each claim. Next, reports on each of the claims are prepared focusing on the appropriate valuation of each of the compensable losses, and on the question of whether the evidence produced by the claimant is sufficient in accordance with article 35(3) of the Rules.

18. The cumulative effect is one of the following recommendations: (a) compensation for the loss in the full amount claimed; (b) compensation for the loss in a lower amount than that claimed; or (c) no compensation.

II. PROCEDURAL ISSUES

A. Panel recommendations

19. Once a motivated recommendation of a panel is adopted by a decision of the Governing Council, it is something to which this Panel gives great weight.

20. All panel recommendations are supported by a full analysis. When a new claim is presented to this Panel it may happen that the new claim will manifest the same characteristics as the previous claim which has been presented to a prior panel. In that event, this Panel will follow the principle developed by the prior panel. Of course, there may still be differences inherent in the two claims at the level of proof of causation or quantum. Nonetheless the principle will be the same.

21. Alternatively, that second claim will manifest different characteristics to the first claim. In that event, those different characteristics may give rise to a different issue of principle and thus warrant a different conclusion by this Panel to that of the previous panel.

B. Evidence of loss

22. Pursuant to article 35(3) of the Rules, corporate claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss. The Governing Council has stated in paragraph 5 of decision 15 that, with respect to business losses, there "will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order to justify a recommendation for compensation (S/AC.26/1992/15).

23. The Panel takes this opportunity to emphasise that what is required of a claimant by article 35(3) of the Rules is the presentation to the Commission of evidence that must go to both causation and quantum. The Panel's interpretation of what is appropriate and sufficient evidence will vary according to the nature of the claim. In implementing this approach, the Panel applies the relevant principles extracted from those within the corpus of principles referred to in article 31 of the Rules.

1. Sufficiency of evidence

24. In the final outcome, claims that are not supported by sufficient and appropriate evidence fail. In the context of the construction and engineering claims that are before this Panel, the most important evidence is documentary. It is in this context that the Panel records a syndrome which it found striking when it addressed the first claims presented to it and which has continued to manifest itself in the claims subsequently encountered. This was the reluctance of claimants to make critical documentation available to the Panel.

25. Imperatively, the express wording of decision 46 of the Governing Council requires that "... claims received in categories 'D', 'E', and 'F' must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss..." In this same decision, the Governing Council confirmed that "... no loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant,..." (S/AC.26/Dec.46(1998)).

26. It is also the case that the Panel has power under the Rules to request additional information and, in unusually large or complex cases, further written submissions. Such requests usually take the form of procedural orders. Where such orders are issued, considerable emphasis is placed on this need for sufficient documentary and other appropriate evidence.

27. Thus there is an obligation to provide the relevant documentary evidence both on the first filing of a claim and on any subsequent steps.

28. What is more, the absence of any relevant contemporary record to support a particular claim means that the claimant is inviting the Panel to make an award, often of millions of dollars, on no foundation other than the assertion of the claimant. This would not satisfy the "sufficient evidence" rule in article 35(3) of the Rules and would go against the instruction of the Governing Council contained in decision 46. It is something that the Panel is unable to do.

2. Sufficiency under article 35(3): The obligation of disclosure

29. Next in the context of documentary evidence, this Panel wishes to highlight an important aspect of the rule that claims must be supported by sufficient documentary and other appropriate evidence. This involves bringing to the attention of the Commission all material aspects of the claim, whether such aspects are seen by the claimant as beneficial to, or reductive of, its claims. The obligation is not dissimilar to good faith requirements under domestic jurisdictions.

3. Missing documents: The nature and adequacy of the paper trail

30. The Panel now turns to the question of what is required in order to establish an adequate paper trail.

31. Where documents cannot be supplied, their absence must be explained in a credible manner. The explanation must itself be supported by the appropriate evidence. Claimants may also supply substitute documentation for or information about the missing documents. Claimants must remember that the mere fact that they suffered a loss at the same time as the hostilities in the Persian Gulf were starting or were in process does not mean that the loss was directly caused by Iraq's invasion and occupation of Kuwait. A causative link must be established. It should also be borne in mind that it was not the intention of the Security Council in its resolutions to provide a "new for old" basis of reimbursement of the losses suffered in respect of tangible property. Capital goods depreciate. That depreciation must be taken into account and demonstrated in the evidence filed with the Commission. In sum, in order for evidence to be considered appropriate and sufficient to demonstrate a loss, the Panel expects claimants to present to the Commission a coherent, logical and sufficiently evidenced file leading to the financial claims that they are making.

32. Of course, the Panel recognises that in time of civil disturbances, the quality of proof may fall below that which would be submitted in a peace time situation. Persons who are fleeing for their lives do not stop to collect the audit records. Allowances have to be made for such vicissitudes.

33. Thus the Panel is not surprised that some of the claimants in the instalments presented to it to date seek to explain the lack of documentation by asserting that it is, or was, located in areas of civil disorder or has been lost or destroyed, or, at least, cannot be accessed. But the fact that offices on the ground in the region have been looted or destroyed would not explain why claimants have not produced any of the documentary records that would reasonably be expected to be found at claimants' head offices situated in other countries.

34. The Panel approaches the claims presented to it in the light of the general and specific requirements to produce documents noted above. Where there is a lack of documentation, combined with no or no adequate explanation for that lack, and an absence of alternative evidence to make good any part of that lack, the Panel has no opportunity or basis upon which to make a recommendation.

C. Amending claims after filing

35. In the course of processing the claims after they have been filed with the Commission, further information is sought from the claimants pursuant to the Rules. When the claimants respond they sometimes seek to use the opportunity to amend their claims. For example, they add new loss elements. They increase the amount originally sought in respect of a particular loss element. They transfer monies between or otherwise adjust the calculation of two or more loss elements. In some cases, they do all of these.

36. The Panel notes that the period for filing category "E" claims expired on 1 January 1996. The Governing Council approved a mechanism for these claimants to file unsolicited supplements until 11 May 1998. After that date a response to an inquiry for additional evidence is not an opportunity for a claimant to increase the quantum of a loss element or elements or to seek to recover in respect of new loss elements. In these circumstances, the Panel is unable to take into account such increases or such new loss elements when it is formulating its recommendations to the Governing Council. It does, however, take into account additional documentation where that is relevant to the original claim, either in principle or in detail. It also exercises its inherent powers to re-characterise a loss, which is properly submitted as to time, but is inappropriately allocated.

37. Some claimants also file unsolicited submissions. These too sometimes seek to increase the original claim in the ways indicated in the previous paragraph. Such submissions when received after 11 May 1998 are to be treated in the same way as amendments put forward in solicited supplements. Accordingly the Panel is unable to, and does not, take into account such amendments when it is formulating its recommendations to the Governing Council.

III. SUBSTANTIVE ISSUES

A. Applicable law

38. As set forth in paragraphs 17 and 18 of the Fourth Report, paragraph 16 of Security Council resolution 687 (1991) reaffirmed the liability of Iraq and defined the jurisdiction of the Commission. Pursuant to article 31 of the Rules, the Panel applies Security Council resolution 687 (1991), other relevant Security Council resolutions, decisions of the Governing Council, and, where necessary, other relevant rules of international law.

B. Liability of Iraq

39. When adopting resolution 687 (1991), the Security Council acted under chapter VII of the Charter of the United Nations which provides for maintenance or restoration of international peace and security. The Security Council also acted under chapter VII when adopting resolution 692 (1991), in which it decided to establish the Commission and the Compensation Fund referred to in paragraph 18 of resolution 687 (1991). Specifically, under resolution 687 (1991), the issue of Iraq's liability for losses falling within the Commission's jurisdiction is resolved and is not subject to review by the Panel.

40. In this context, it is necessary to address the meaning of the term "Iraq". In Governing Council decision 9 (S/AC.26/1992/9) and other Governing Council decisions, the word "Iraq" was used to mean the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. In the Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "E3" Claims (the "Fifth Report", S/AC.26/1999/2), this Panel adopted the presumption that for contracts performed in Iraq, the other contracting party was an Iraqi Government entity.

C. The "arising prior to" clause

41. The Panel recognises that it is difficult to establish a fixed date for the exclusion of its jurisdiction that does not contain an arbitrary element. With respect to the interpretation of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), the Panel of Commissioners that reviewed the first instalment of "E2" claims concluded that the "arising prior to" clause was intended to exclude the foreign debt of Iraq which existed at the time of Iraq's invasion of Kuwait from the jurisdiction of the Commission. As a result, the "E2" Panel found that:

> "In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside of the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990." ("Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of 'E2' Claims", S/AC.26/1998/7, paragraph 90).

42. That report was approved by the Governing Council. Accordingly, this Panel adopts the "E2" Panel's interpretation which is to the following effect:

(a) The phrase "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through normal mechanisms" was intended to have an exclusionary effect on the Commission's jurisdiction, i.e., such debts and obligations are not compensable by the Commission;

(b) The limitation contained in the clause "arising prior to 2 August 1990" was intended to leave unaffected the debts and obligations of Iraq which existed prior to Iraq's invasion and occupation of Kuwait; and

(c) The terms "debts" and "obligations" should be given the customary and usual meanings applied to them in ordinary discourse.

43. Thus, this Panel accepts that, in general, a claim relating to a "debt or obligation arising prior to 2 August 1990" means a debt or obligation that is based on work performed or services rendered prior to 2 May 1990.

D. Application of the "direct loss" requirement

44. Paragraph 21 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1) is the seminal rule on "directness" for category "E" claims. It provides in relevant part that compensation is available for:

> "... any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:
>
> (a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;
>
> (b) Departure of persons from or their inability to leave Iraq or Kuwait (or a decision not to return) during that period;
>
> (c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;
>
> (d) The breakdown of civil order in Kuwait or Iraq during that period; or
>
> (e) Hostage-taking or other illegal detention."

45. The text of paragraph 21 of decision 7 is not exhaustive and leaves open the possibility that there may be causes of "direct loss" other than those enumerated. Paragraph 6 of decision 15 of the Governing Council (S/AC.26/1992/15) confirms that there "will be other situations where evidence can be produced showing claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait". Should that be the case, the claimants will have to prove specifically that a loss that was not suffered as a result of one of the five categories of events set out in paragraph 21 of decision 7 is nevertheless "direct". Paragraph 3 of decision 15 emphasises that for any alleged loss or damage to be compensable, the "causal link must be direct". (See also paragraph 9 of decision 9).

46. While the phrase "as a result of" contained in paragraph 21 of decision 7 is not further clarified, Governing Council decision 9 provides guidance as to what may be considered business "losses suffered as a result of" Iraq's invasion and occupation of Kuwait. It identifies the three main categories of loss types in the "E" claims: losses in connection with contracts, losses relating to tangible assets and losses relating to income-producing properties. Thus, decisions 7 and 9 provide specific guidance to the Panel as to how the "direct loss" requirement must be interpreted.

47. In the light of the decisions of the Governing Council identified above, the Panel has reached certain conclusions as to the meaning of "direct loss". These conclusions are set out in the following paragraphs.

48. With respect to physical assets in Iraq or in Kuwait as at 2 August 1990, a claimant can prove a direct loss by demonstrating two matters. First, that the breakdown in civil order in these countries, which resulted from Iraq's invasion and occupation of Kuwait, caused the claimant to evacuate its

employees. Second, as set forth in paragraph 13 of decision 9, that the claimant left physical assets in Iraq or in Kuwait.

49. With respect to losses relating to contracts to which Iraq was a party, force majeure or similar legal principles are not available as a defence to the obligations of Iraq.

50. With respect to losses relating to contracts to which Iraq was not a party, a claimant may prove a direct loss if it can establish that Iraq's invasion and occupation of Kuwait or the breakdown in civil order in Iraq or Kuwait following Iraq's invasion caused the claimant to evacuate the personnel needed to perform the contract.

51. In the context of the losses set out above, reasonable costs which have been incurred to mitigate those losses are direct losses. The Panel bears in mind that the claimant was under a duty to mitigate any losses that could have been reasonably avoided after the evacuation of its personnel from Iraq or Kuwait.

52. These findings regarding the meaning of "direct loss" are not intended to resolve every issue that may arise with respect to this Panel's interpretation of Governing Council decisions 7 and 9. Rather, these findings are intended as initial parameters for the review and evaluation of the claims.

53. Finally, there is the question of the geographical extent of the impact of events in Iraq and Kuwait outside these two countries. Following on the findings of the "E2" Panel in its first report, this Panel finds that damage or loss suffered as a result of (a) military operations in the region by either the Iraqi or the Allied Coalition Forces or (b) a credible and serious threat of military action that was connected to Iraq's invasion and occupation of Kuwait is compensable in principle. Of course, the further the project in question was from the area where military operations were taking place, the more the claimant may have to do to establish causality. On the other hand, the potential that an event such as the invasion and occupation of Kuwait has for causing an extensive ripple effect cannot be ignored. Each case must depend on its facts.

E. Date of loss

54. There is no general principle with respect to the date of loss. It needs to be addressed on an individual basis. In addition, the specific loss elements of each claim may give rise to different dates if analysed strictly. However, applying a different date to each loss element within a particular claim is impracticable as a matter of administration. Accordingly, the Panel has decided to determine a single date of loss for each claimant, which, in most cases, coincides with the date of the collapse of the project.

F. Currency exchange rate

55. While many of the costs incurred by the claimants were denominated in currencies other than United States dollars, the Commission issues its awards in that currency. Therefore the Panel is required to determine the appropriate rate of exchange to apply to losses expressed in other currencies.

56. The Panel finds that, as a general rule, where an exchange rate is set forth in the contract then that is the appropriate rate for losses under the relevant contracts because this was specifically agreed by the parties.

57. For losses that are not contract based, however, the contract rate is not usually an appropriate rate of exchange. For non-contractual losses, the Panel finds the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics, at the date of loss.

G. Interest

58. On the issue of the appropriate interest rate to be applied, the relevant Governing Council decision is decision 16 (S/AC.26/1992/16). According to that decision, "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". In decision 16 the Governing Council further specified that "[i]nterest will be paid after the principal amount of awards", while postponing any decision on the methods of calculation and payment.

59. Accordingly, the Panel recommends that interest shall run from the date of loss.

H. Claim preparation costs

60. Some claimants seek to recover compensation for the cost of preparing their claims. The compensability of claim preparation costs has not hitherto been ruled on and will be the subject, in due course, of a specific decision by the Governing Council. Therefore, this Panel has made and will make no recommendations with respect to claim preparation costs in any of the claims where they have been raised.

I. Contract losses

1. Claims for contract losses with non-Iraqi party

61. Some of the claims relate to losses suffered as a result of non-payment by a non-Iraqi party. The fact of such a loss, simpliciter, does not establish it as a direct loss within the meaning of Security Council resolution 687 (1991). In order to obtain compensation, a claimant must lodge sufficient evidence that the entity with which it carried on business on 2 August 1990 was unable to make payment as a direct result of Iraq's invasion and occupation of Kuwait.

62. A good example of this would be that the party was insolvent and that the insolvency was a direct result of Iraq's invasion and occupation of Kuwait. At the very least a claimant should demonstrate that the other party had not renewed operations after the end of the occupation. In the event that there are multiple factors which have resulted in the failure to resume operations, apart from the proved insolvency of the other party, the Panel will have to be satisfied that the effective reason or causa causans was Iraq's invasion and occupation of Kuwait.

63. Any failure to pay because the other party was excused from performance by the operation of law which came into force after Iraq's invasion and occupation of Kuwait is in the opinion of this Panel the result of a novus actus interveniens and is not a direct loss arising out of Iraq's invasion and occupation of Kuwait.

2. Advance payments

64. Many construction contracts provide for an advance payment to be made by the employer to the contractor. These advance payments are often calculated as a percentage of the initial price (initial, because many such contracts provide for automatic and other adjustments of the price during the execution of the works). The purpose of the advance payment is to facilitate certain activities which the contractor will need to carry out in the early stages.

65. Mobilisation is often one such activity. Plant and equipment may need to be purchased. A workforce will have to be assembled and transported to the work site, where facilities will be needed to accommodate it. Another such activity is the ordering of substantial or important materials which are in short supply and may, therefore, be available only at a premium or at a long lead time.

66. Advance payments are usually secured by a bond provided by the contractor, and are usually paid upon the provision of the bond. They are frequently repaid over a period of time by way of deduction by the employer from the sums which are payable at regular intervals (often monthly) to the contractor for work done. See, in the context of payments which are recovered over a period of time, the observations about amortisation at paragraph 120, infra. Those observations apply mutatis mutandis to the repayment of advance payments.

67. The Panel notes that some claimants presenting claims have not clearly accounted for the amounts of money already paid to them by the employer. This Panel regularly sees evidence of advance payments amounting to tens of millions of United States dollars. Where advance payments have been part of the contractual arrangements between the claimant and the employer, the claimant must account for these payments in reduction of its claims, unless these payments can be shown to have been recouped in whole or in part by the employer. Where no explanation or proof of repayment is forthcoming, the Panel has no option but to conclude that these amounts paid in advance are due, on a final accounting, to the employer, and must be deducted from the claimant's claim.

3. Contractual arrangements to defer payments

(a) The analysis of "old debt"

68. Where payments are deferred under the contracts upon which the claims are based, an issue arises as to whether the claimed losses are "debts and obligations arising prior to 2 August 1990" and therefore outside the jurisdiction of the Commission.

69. In its first report, the "E2" Panel interpreted Security Council resolution 687 (1991) as intending to eliminate what may be conveniently called "old debt". In applying this interpretation to the claim before it the "E2" Panel identified, as "old debt", cases where the performance giving rise to the

original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990. In those cases, claims based on payments owed, in kind or in cash, for such performance are outside the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990. "Performance" as understood by the "E2" Panel for the purposes of this rule meant complete performance under a contract, or partial performance, so long as an amount was agreed to be paid for that portion of completed partial performance. In the claim the "E2" Panel was considering, the work under the contract was clearly performed prior to 2 May 1990. However, the debts were covered by a form of deferred payments agreement dated 29 July 1984. This agreement was concluded between the parties to the original contracts and postdated the latter.

70. In its analysis, the "E2" Panel found that deferred payments arrangements go to the very heart of what the Security Council described in paragraph 16 of resolution 687 as a debt of Iraq arising prior to 2 August 1990. It was this very kind of obligation which the Security Council had in mind when, in paragraph 17 of resolution 687 (1991), it directed Iraq to "adhere scrupulously" to satisfying "all of its obligations concerning servicing and repayment". Therefore, irrespective of whether such deferred payment arrangements may have created new obligations on the part of Iraq under a particular applicable municipal law, they did not do so for the purposes of resolution 687 (1991) and are therefore outside the jurisdiction of this Commission.

71. The arrangements that the "E2" Panel was considering were not arrangements that arose out of genuine arms' length commercial transactions, entered into by construction companies as part and parcel of their normal businesses. Instead the situation which the "E2" Panel was addressing was described as follows:

> "The negotiation of these deferred payment arrangements was typically conducted with Iraq not by the contractor or supplier itself, but rather by its Government. Typically, the Government negotiated on behalf of all of the contracting parties from the country concerned who were in a similar situation. The deferred payment arrangements with Iraq were commonly entered into under a variety of forms, including complicated crude oil barter arrangements under which Iraq would deliver certain amounts of crude oil to a foreign State to satisfy consolidated debts; the foreign State then would sell the oil and, through its central bank, credit particular contractors' accounts." (S/AC.26/1998/7, paragraph 93).
>
> "Iraq's debts were typically deferred by contractors who could not afford to "cut their losses" and leave, and thus these contractors continued to work in the hope of eventual satisfaction and continued to amass large credits with Iraq. In addition, the payment terms were deferred for such long periods that the debt servicing costs alone had a significant impact on the continued growth of Iraq's foreign debt." (S/AC.26/1998/7, paragraph 94).

72. This Panel agrees.

(b) Application of the "old debt" analysis

73. In the application of this analysis to claims other than those considered by the "E2" Panel, there are two aspects which are worth mentioning.

74. The first is that the problem does not arise where the actual work has been performed after 2 May 1990. The arrangement deferring payment is irrelevant to the issue. The issue typically resolves itself in these cases into one of proof of the execution of the work, the quantum, the non payment and causation.

75. The second concerns the ambit of the above analysis. As noted above, the claims which led to the above analysis arose out of "non-commercial" arrangements. They were situations where the original terms of payment entered into between the parties had been renegotiated during the currency of the contract or the negotiations or renegotiations were driven by inter-governmental exchanges. Such arrangements were clearly the result of the impact of Iraq's increasing international debt.

76. Thus one can see underlying the "E2" Panel's analysis two important factors. The first was the subsequent renegotiation of the payment terms of an existing contract to the detriment of the claimant (contractor). The second was the influence on contracts of the transactions between the respective governments. In both cases, a key element underlying the arrangements must be the impact of Iraq's mountain of old debt.

77. In the view of this Panel, where either of these factors is wholly or partially the explanation of the "loss" suffered by the claimant, then that loss or the relevant part of it is outside the jurisdiction of the Commission and cannot form the basis of recommendation by a panel. It is not necessary that both factors be present. A contract that contained deferment provisions as originally executed would still be caught by the "arising prior to" rule if the contract was the result of an inter-governmental agreement driven by the exigencies of Iraq's financial problems. It would not be a commercial transaction so much as a political agreement, and the "loss" would not be a loss falling within the jurisdiction of the Commission.

4. Losses arising as a result of unpaid retention monies

78. The claims before this Panel include requests for compensation for what could be described as another form of deferred payment, namely unpaid retention monies.

79. Under many if not most construction contracts, provision is made for the regular payment to the contractor of sums of money during the performance of the work under the contract. The payments are often monthly, and often calculated by reference to the amount of work that the contractor has done since the last regular payment was calculated.

80. Where the payment is directly related to the work done, it is almost invariably the case that the amount of the actual (net) payment is less than the contractual value of the work done. This is because the employer retains in his own hands a percentage (usually 5 per cent or 10 per cent and with or without an upper limit) of that contractual value. (The same approach usually obtains as between the

contractor and his subcontractors.) The retained amount is often called the "retention" or the "retention fund". It builds up over time. The less work the contractor carries out before the project comes to an early halt, the smaller the fund.

81. The retention is usually payable in two stages, one at the commencement of the maintenance period, as it is often called, and the other at the end. The maintenance period usually begins when the employer first takes over the project, and commences to operate or use it. Thus the work to which any particular sum which is part of the retention fund relates may have been executed a very long time before the retention fund is payable. It follows that a loss in respect of the retention fund cannot be evaluated by reference to the time when the work which gave rise to the retention fund was executed, as for instance is described at paragraph 74, supra. Entitlement to be paid the retention fund is dependent on the actual or anticipated overall position at the end of the project.

82. Retention fund provisions are very common in the construction world. The retention fund serves two roles. It is an encouragement to the contractor to remedy defects appearing before or during the maintenance period. It also provides a fund out of which the employer can reimburse itself for defects that appear before or during the maintenance period which the contractor has, for whatever reason, failed or refused to make good.

83. In the claims before this Panel, events - in the shape of Iraq's invasion and occupation of Kuwait - have intervened. The contract has effectively come to an end. There is no further scope for the operation of the retention provisions. It follows that the contractor, through the actions of Iraq, has been deprived of the opportunity to recover the money. In consequence the claims for retention fall within the jurisdiction of the Commission.

84. In the light of the above considerations it seems to this Panel that the situation in the case of claims for retention is as follows:

(a) The evidence before the Commission may show that the project was in such trouble that it would never have reached a satisfactory conclusion. In such circumstances, there can be no positive recommendation, principally because there is no direct causative link between the loss and the invasion and occupation of Kuwait.

(b) Equally the evidence may show that the project would have reached a conclusion, but that there would have been problems to resolve. Accordingly the contractor would have had to expend money resolving those problems. That potential cost would have to be deducted from the claim for retention; and accordingly the most convenient course would be to recommend an award to the contractor of a suitable percentage of the unpaid retention.

(c) Finally, on the evidence it may be the case that there is no reason to believe or conclude that the project would have gone other than satisfactorily. In those circumstances, it seems that the retention claim should succeed in full.

5. Guarantees, bonds, and like securities

85. Financial recourse agreements are part and parcel of a major construction contract. Instances are (a) guarantees - for example given by parent companies or through banks; (b) what are called "on demand" or "first demand" bonds (hereinafter "on demand bonds") which support such matters as bidding and performance; and (c) guarantees to support advance payments. (Arrangements with government sponsored bodies that provide what might be called "fall-back" insurance are in a different category. As to these, see paragraphs 95 to 102, infra).

86. Financial recourse arrangements give rise to particular problems when it comes to determining the claims filed in the population of construction and engineering claims. A convenient and stark example is that of the on demand bond.

87. The purpose of an on demand bond is to permit the beneficiary to obtain monies under the bond without having to prove default on the part of the other party - namely, in the situations under discussion here, the contractor executing the work. Such a bond is often set up by way of a guarantee given by the contractor or its parent to its own bank in its home State. That bank gives an identical bond to a bank (the second bank) in the State of the employer under the construction contract. In its turn, the second bank gives an identical bond to the employer. This leaves the employer, at least theoretically, in the very strong position of being able, without having to prove any default on the part of the contractor, to call down a large sum of money which will be debited to the contractor.

88. Of course, the contractor's bank will have two arrangements in place. First, an arrangement whereby it is secured as to the principal sum, the subject of the bond, in case the bond is called. Second, it will have arranged to exact a service charge, typically raised quarterly, half-yearly or annually.

89. Many claimants have raised claims in respect of the service charges; and also in respect of the principal sums. The former are often raised in respect of periods of years measured from the date of Iraq's invasion and occupation of Kuwait. The latter have, hitherto at least, been cautionary claims, in case the bonds are called in the future.

90. This Panel approaches this issue by observing that the strength of the position given to the employer by the on demand bond is sometimes more apparent than real. This derives from the fact that the courts of some countries are reluctant to enforce payment of such bonds if they feel that there is serious abuse by the employer of its position. For example, where there is a persuasive allegation of fraud, some courts will be prepared to injunct the beneficiary from making a call on the bond, or one or other of the banks from meeting the demand. It is also the case that there may be remedies for the contractor in some jurisdictions when the bonds are called in circumstances that are clearly outside the original contemplation of the parties.

91. The Panel notes that most if not all contracts for the execution of major construction works by a contractor from one country in the territory of another country will have clauses to deal with war, insurrection or civil disorder. Depending on the approach of the relevant governing law to such

matters, these provisions, if triggered, may have a direct or indirect effect on the validity of the bond. Direct, if under the relevant legal regime, the effects of the clause in the construction contract apply also to the bond; indirect if the termination or modification of the underlying obligation (the construction contract) gives rise to the opportunity to seek a forum-driven modification or termination of the liabilities under the bond.

92. In addition, the simple passage of time is likely to give rise to the right to treat the bond obligation as expired or unenforceable, or to seek a forum-driven resolution to the same effect. In addition, it is necessary to bear in mind the existence of the trade embargo and related measures. a/ The effect of the trade embargo and related measures was that an on demand bond in favour of an Iraqi party could not legally have been honoured after 6 August 1990. In those circumstances, it is difficult to see what benefit the issuing bank was providing in return for any service charges that it was paid once notice of the embargo had been widely disseminated. If the bank is providing no benefit, it is difficult to ascertain a juridical basis for any entitlement to receive the service charges

93. In sum, and in the context of Iraq's invasion and occupation of Kuwait and the time which has passed since then, it seems to this Panel that it is highly unlikely that on demand bond obligations of the sort this Panel has seen in the instalments it has addressed are alive and effective.

94. If that analysis is correct, then it seems to this Panel that claims for service charges on these bonds will only be sustainable in very unusual circumstances. Equally, claims for the principal will only be sustainable where the principal has in fact been irrevocably paid out and where the beneficiary of the bond had no factual basis to make a call upon the bond.

6. Export credit guarantees

95. Arrangements with government sponsored bodies that provide what might be called "fall-back" insurance are in a different case to guarantees generally. These forms of financial recourse have names such as "credit risk guarantees". They are in effect a form of insurance, often underwritten by the government of the territory in which the contractor is based. They exist as part of the economic policy of the government in question, in order to encourage trade and commerce by its nationals abroad.

96. Such guarantees often have a requirement that the contractor must exhaust all local remedies before calling on the guarantee; or must exhaust all possible remedies before making a call.

97. Claims have been made by parties for:

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a/ The expression the "trade embargo and related measures" refers to the prohibitions in Security Council resolution 661 (1990) and relevant subsequent resolutions and the measures taken by the states pursuant thereto.

(a) Reimbursement of the premia paid to obtain such guarantees; and also for

(b) Shortfalls between the amounts recovered under such guarantees and the losses said to have been incurred.

In the view of this Panel, one of these types of claim is misconceived; and the other is mis-characterised.

98. A claim for the premia is misconceived. A premium paid for any form of insurance is not recoverable unless the policy is avoided. Once the policy is in place, either the event that the policy is intended to embrace occurs, or it does not. If it does, then there is a claim under the policy. If it does not then there is no such claim. In neither case does it seem to the Panel that the arrangements - prudent and sensible as they are - give rise to a claim for compensation for the premia. There is no "loss" properly so called or any causative link with Iraq's invasion and occupation of Kuwait.

99. Further, where a contractor has in fact been indemnified in whole or in part by such a body in respect of losses incurred as a result of Iraq's invasion and occupation of Kuwait, there is, to that extent, no longer any loss for which that contractor can claim to the Commission. Its loss has been made whole.

100. The second situation is that where a contractor claims for the balance between what are said to be losses incurred as a result of Iraq's invasion and occupation of Kuwait and what has been recovered from the guarantor.

101. Here the claim is mis-characterised. That balance may indeed be a claimable loss; but its claimability has nothing to do with the fact that the monies represent a shortfall between what has been recovered under the guarantee and what has been lost. Instead, the correct analysis should start from a review of the cause of the whole of the loss of which the balance is all that remains. The first step is to establish whether there is evidence to support that whole sum, that it is indeed a sum that the claimant has paid out or failed to recover; and that there is the necessary causation. To the extent that the sum is established, then to that extent the claim is prima facie compensable. However, so far as there has been reimbursement by the guarantor, the loss has been made good, and there is nothing left to claim for. It is only if there is still some qualifying loss, not made good, that there is room for a recommendation of this Panel.

102. Finally, there are the claims by the bodies granting the credit guarantees who have paid out sums of money. They entered into an insurance arrangement with the contractor. In consideration of that arrangement, they required the payment of premia. As before, either the event covered by the insurance occurred or it did not. In the former case, the Panel would have thought that the guarantor was contractually obliged to pay out; and in the latter case, not so. Whether any payments made in these circumstances give rise to a compensable claim is not a matter for this Panel. Such claims come within the population of claims allocated to the "E/F" Panel.

7. Frustration and force majeure clauses

103. Construction contracts, both in common law and under the civil law, frequently contain provisions to deal with events that have wholly changed the nature of the venture. Particular events which are addressed by such clauses include war, civil strife and insurrection. Given the length of time that a major construction project takes to come to fruition and the sometimes volatile circumstances, both political and otherwise, in which such contracts are carried out, this is hardly surprising. Indeed, it makes good sense. The clauses make provision as to how the financial consequences of the event are to be borne; and what the result is to be so far as the physical project is concerned.

104. Such clauses give rise to two questions when it comes to the population of claims before this Panel. The first question is whether Iraq is entitled to invoke such clauses to reduce its liability. The second is whether claimants may utilise such clauses to support or enhance their recovery from the Commission.

105. As to the first question, the position seems to this Panel to be as follows. In the population of claims before the Commission, the frustrating or force majeure event will nearly always be the act or omission of Iraq itself. However, such a clause is designed to address events which, if they occurred at all, were anticipated to be wholly outside the control of both parties. It would be quite inappropriate for the causal wrongdoer to rely on such clause to reduce the consequences of its own wrongdoing.

106. But the second question then arises as to whether claimants can rely upon such clauses. An example of such reliance would be where the clause provides for the acceleration of payments which otherwise would not have fallen due. As to this question, one example of this sort of claim has been addressed and the answer categorically spelt out in the first report of the "E2" Panel as follows:

> "Second, [the Claimants] direct the Commission's attention to the clauses relating to 'frustration' in the respective underlying contracts. The Claimants assert that in the case of frustration of contract, these clauses accelerate the payments due under the contract, in effect giving rise to a new obligation on the part of Iraq to pay all the amounts due and owing under the contract regardless of when the underlying work was performed. The Panel has concluded that claimants may not invoke such contractual agreements or clauses before the Commission to avoid the 'arising prior to' exclusion established by the Security Council in resolution 687 (1991); consequently, this argument must fail." (S/AC.26/1998/7, paragraph 188).

107. The situation described above was one where the work that was the subject of the claim had been performed prior to Iraq's invasion and occupation of Kuwait, and, therefore, fell clearly foul of the "arising prior to" rule. However, the claimants, who had agreed on arrangements for delayed payment, sought to rely on the frustration clause to get over this problem. The argument was, as this Panel understands it, that the frustration clause was triggered by the events which had in fact occurred, namely Iraq's invasion and occupation of Kuwait. The frustration clause provided for the accelerated payment of sums due under the contract. Payment of the sums had originally been deferred to dates which were still in the future at the time of the invasion and occupation; but the frustrating event

meant that they became due during the time of, or indeed at the beginning of, Iraq's invasion and occupation of Kuwait. Accordingly, the payments had, in the event, become due within the period covered by the jurisdiction established by Security Council resolution 687 (1991). Therefore, a claim for the reimbursement of these payments could be entertained by the "E2" Panel.

108. It was this claim that the "E2" Panel rejected. This Panel agrees.

109. There remains the situation where the frustration clause is being used by claimants to enhance a claim, other than by way of circumventing the "arising prior to" rule, for example, where the acceleration delivered by the frustration clause is put forward to seek to bring into the period within the jurisdiction of the Commission payments which would otherwise have been received, under the contract, well after the liberation of Kuwait, and therefore would not otherwise be compensable.

110. In the view of this Panel, such claims would similarly fail. In this case, as in the case addressed by the "E2" Panel, claimants are seeking to use the provisions of private contracts to enhance the jurisdiction granted by Security Council resolution 687 (1991) and defined by jurisprudence developed by the Commission. That is not an appropriate course. It is not open to individual entities by agreement or otherwise, to modify the jurisdiction of the Commission.

J. Claims for overhead and "lost profits"

1. General

111. Any construction project can be broken down into a number of components. All of these components contribute to the pricing of the works. In this Panel's view, it is helpful for the examination of these kinds of claims to begin by rehearsing in general terms the way in which many contractors in different parts of the world construct the prices that ultimately appear in the construction contracts they sign. Of course, there is no absolute rule as to this process. Indeed, it is unlikely that any two contractors will assemble their bids in exactly the same way. But the constraints of construction work and the realities of the financial world impose a general outline from which there will rarely be a substantial deviation.

112. Many of the construction contracts encountered in the claims submitted to this Panel contain a schedule of rates or a "bill of quantities". This document defines the amount to be paid to the contractor for the work performed. It is based on previously agreed rates or prices. The final contract price is the aggregate value of the work calculated at the quoted rates together with any variations and other contractual entitlements and deductions which increase or decrease the amount originally agreed.

113. Other contracts in the claims submitted to this Panel are lump sum contracts. Here the schedule of rates or bill of quantities has a narrower role. It is limited to such matters as the calculation of the sums to be paid in interim certificates and the valuation of variations.

114. In preparing the schedule of rates, the contractor will plan to recover all of the direct and indirect costs of the project. On top of this will be an allowance for the "risk margin". In so far as

there is an allowance for profit it will be part of the "risk margin". However, whether or not a profit is made and, if made, in what amount, depends obviously on the incidence of risk actually incurred.

115. An examination of actual contracts combined with its own experience of these matters has provided this Panel with guidelines as to the typical breakdown of prices that may be anticipated on construction projects of the kind relevant to the claims submitted to this Panel.

116. The key starting point is the base cost - the cost of labour, materials and plant – in French the "prix secs". In another phrase, this is the direct cost. The direct cost may vary, but usually represents 65 to 75 per cent of the total contract price.

117. To this is added the indirect cost - for example the supply of design services for such matters as working drawings and temporary works by the contractor's head office. Typically, this indirect cost represents about 25 to 30 per cent of the total contract price.

118. Finally, there is what is called the "risk margin" - the allowance for the unexpected. The risk margin is generally in the range of between barely above zero and five per cent of the total contract price. The more smoothly the project goes, the less the margin will have to be expended. The result will be enhanced profits, properly so called, recovered by the contractor at the end of the day. The more the unexpected happens and the more the risk margin has to be expended, the smaller the profit will ultimately be. Indeed, the cost of dealing with the unexpected or the unplanned may equal or exceed the risk margin, leading to a nil result or a loss.

119. In the view of the Panel, it is against this background that some of the claims for contract losses need to be seen.

2. Head office and branch office expenses

120. These are generally regarded as part of the overhead. These costs can be dealt with in the price in a variety of ways. For example, they may be built into some or all of the prices against line items; they may be provided for in a lump sum; they may be dealt with in many other ways. One aspect, however, will be common to most, if not all, contracts. It will be the intention of the contractor to recover these costs through the price at some stage of the execution of the contract. Often the recovery has been spread through elements of the price, so as to result in repayment through a number of interim payments during the course of the contract. Where this has been done, it may be said that these costs have been amortised. This factor is relevant to the question of double-counting (see paragraph 123, infra).

121. If therefore any part of the price of the works has been paid, it is likely that some part of these expenses has been recovered. Indeed, if these costs have been built into items which are paid early, a substantial part or even all of these costs may have been recovered.

122. If these items were the subject of an advance payment, again they may have been recovered in their entirety at an early stage of the project. Here of course there is an additional complication, since the advance payments will be credited back to the employer - see paragraph 66, supra - during the

course of the work. In this event, the Panel is thrown back onto the question of where in the contractor's prices payment for these items was intended to be.

123. In all of these situations, it is necessary to avoid double-counting. By this the Panel means the situation where the contractor is specifically claiming, as a separate item, elements of overhead which, in whole or in part, are already covered by the payments made or claims raised for work done.

124. The same applies where there are physical losses at a branch or indeed a site office or camp. These losses are properly characterised, and therefore claimable, if claimable at all, as losses of tangible assets.

3. Loss of profits on a particular project

125. Governing Council decision 9, paragraph 9, provides that where "continuation of the contract became impossible for the other party as a result of Iraq's invasion and occupation of Kuwait, Iraq is liable for any direct loss the other party suffered as a result, including lost profits".

126. As will be seen from the observations at paragraphs 111 to 119, supra, the expression "lost profits" is an encapsulation of quite a complicated concept. In particular, it will be appreciated that achieving profits or suffering a loss is a function of the risk margin and the actual event.

127. The qualification of "margin" by "risk" is an important one in the context of construction contracts. These contracts run for a considerable period of time; they often take place in remote areas or in countries where the environment is hostile in one way or another; and of course they are subject to political problems in a variety of places - where the work is done, where materials, equipment or labour have to be procured, and along supply routes. The surrounding circumstances are thus very different and generally more risk prone than is the case in the context of, say, a contract for the sale of goods.

128. In the view of this Panel it is important to have these considerations in mind when reviewing a claim for lost profits on a major construction project. In effect one must review the particular project for what might be called its "loss possibility". The contractor will have assumed risks. He will have provided a margin to cover these risks. He will have to demonstrate a substantial likelihood that the risks would not occur or would be overcome within the risk element so as to leave a margin for actual profit.

129. This approach, in the view of this Panel, is inherent in the thinking behind paragraph 5 of Governing Council decision 15. This paragraph expressly states that a claimant seeking compensation for business losses such as loss of profits, must provide "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order for compensation to be awarded.

130. In the light of the above analysis, and in conformity with the two Governing Council decisions cited above, this Panel requires the following from those construction and engineering claimants that seek to recover for lost profits. First, the phrase "continuation of the contract" imposes a requirement on the claimant to prove that it had an existing contractual relationship at the time of the invasion.

Second, the provision requires the claimant to prove that the continuation of the relationship was rendered impossible by Iraq's invasion and occupation of Kuwait. This provision indicates a further requirement that profits should be measured over the life of the contract. It is not sufficient to prove that there would have been a "profit" at some stage before the completion of the project. Such a proof would only amount to a demonstration of a temporary credit balance. This can even be achieved in the early stages of a contract, for example where the pricing has been "front-loaded" for the express purpose of financing the project.

131. Instead, the claimant must lodge sufficient and appropriate evidence to show that the contract would have been profitable as a whole. Such evidence would include projected and actual financial information relating to the relevant project, such as audited financial statements, budgets, management accounts, turnover, original bids and tender sum analyses, time schedules drawn up at the commencement of the works, profit/loss statements, finance costs and head office costs prepared by or on behalf of the claimant for each accounting period from the first year of the relevant project to March 1993. The claimant should also provide: original calculations of profit relating to the project and all revisions to these calculations made during the course of the project; management reports on actual financial performance as compared to budgets that were prepared during the course of the project; evidence demonstrating that the project proceeded as planned, such as monthly/periodic reports, planned/actual time schedules, interim certificates or account invoices, details of work that was completed but not invoiced by the claimant, details of payments made by the employer and evidence of retention amounts that were recovered by the claimant. In addition, the claimant should provide evidence of the percentage of the works completed at the time work on the project ceased.

4. Loss of profits for future projects

132. Some claimants say they would have earned profits on future projects, not let at the time of Iraq's invasion and occupation of Kuwait. Such claims are of course subject to the sorts of considerations set out by this Panel in its review of claims for lost profits on individual projects. In addition, it is necessary for such a claimant to overcome the problem of remoteness. How can a claimant be certain that it would have won the opportunity to carry out the projects in question? If there was to be competitive tendering, the problem is all the harder. If there was not to be competitive tendering, what is the basis of the assertion that the contract would have come to the claimant?

133. Accordingly, in the view of this Panel, for such a claim to warrant a recommendation, it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e., profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded. Among other matters, it will be necessary to establish a picture of the assets that were being employed so that the extent to which those assets would continue to be productive in the future can be determined. Balance sheets for previous years will have to be produced, along with relevant strategy statements or like documents which were in fact utilised in the past. The current strategy statement will also have to be provided. In all cases, this Panel will be looking for contemporaneous documents rather than ones that

have been formulated for the purpose of the claim; although the latter may have a useful explanatory or demonstrational role.

134. Such evidence is often difficult to obtain; and accordingly in construction cases such claims will only rarely be successful. And even where there is such evidence, the Panel is likely to be unwilling to extend the projected profitability too far into the future. The political exigencies of work in a troubled part of the world are too great to justify looking many years ahead.

K. Loss of monies left in Iraq

1. Funds in bank accounts in Iraq

135. Numerous claimants seek to recover compensation for funds on deposit in Iraqi banks. Such funds were of course in Iraqi dinars and were subject to exchange controls.

136. The first problem with these claims is that it is often not clear that there will be no opportunity in the future for the claimant to have access to and to use such funds. Indeed, many claimants, in their responses to interrogatories or otherwise have modified their original claims to remove such elements, as a result of obtaining access to such funds after the initial filing of their claim with the Commission.

137. Second, for such a claim to succeed it would be necessary to establish that in the particular case, Iraq would have permitted the exchange of such funds into hard currency for the purposes of export. For this, appropriate evidence of an obligation to this effect on the part of Iraq is required. Furthermore, this Panel notes that the decision to deposit funds in banks located in particular countries is a commercial decision, which a corporation engaged in international operations is required to make. In making this decision, a corporation would normally take into account the relevant country or regional risks involved.

138. This Panel, in analysing the claims presented to it to date concludes that, in most cases, it will be necessary for a claimant to demonstrate (in addition to such matters as loss and quantum) that:

(a) The relevant Iraqi entity was under a contractual or other specific duty to exchange those funds for convertible currencies;

(b) Iraq would have permitted the transfer of the converted funds out of Iraq; and

(c) This exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

139. Absent proof of these aspects of the matter, it is difficult to see how the claimant can be said to have suffered any "loss". If there is no loss, this Panel is unable to recommend compensation.

2. Petty cash

140. Exactly the same considerations apply to claims for petty cash left in Iraq in Iraqi dinars. These monies were left in the offices of claimants when they departed from Iraq. The circumstances in which the money was left behind vary somewhat; and the situation which thereafter obtained also varies - some claimants contending that they returned to Iraq but the monies were gone; and others

being unable to return to Iraq and establish the position. In these different cases, the principle seems to this Panel to be the same. Claimants in Iraq needed to have available sums (which could be substantial) to meet liabilities which had to be discharged in cash. These sums necessarily consisted of Iraqi dinars. Accordingly, absent evidence of the same matters as are set out in paragraph 138, supra, it will be difficult to establish a "loss", and in those circumstances, this Panel is unable to recommend compensation.

3. Customs deposits

141. In this Panel's understanding, these sums are paid, nominally at least, as a fee for permission to effect a temporary importation of plant, vehicles or equipment. The recovery of these deposits is dependent on obtaining permission to export the relevant plant, vehicles and equipment.

142. The Panel further understands that such permission was hard to obtain in Iraq prior to Iraq's invasion and occupation of Kuwait. Accordingly, although defined as a temporary exaction, it was often permanent in fact, and no doubt contractors experienced in the subtleties of working in Iraq made suitable allowances. And no doubt they were able to, or expected to, recover these exactions through payment for work done. Once the invasion and occupation of Kuwait had occurred, obtaining such permission to export became appreciably harder. Indeed, given the trade embargo, a necessary element would have been the specific approval of the Security Council.

143. In the light of the foregoing, it seems to the Panel that claims to recover these duties need to be supported by sufficient evidentiary material, going to the issue of whether, but for Iraq's invasion and occupation of Kuwait, such permission would, in fact or on a balance of probabilities, have been forthcoming.

144. Absent such evidence and leaving aside any question of double-counting, (see paragraph 123, supra), the Panel is unlikely to be able to make any positive recommendations for compensating unrecovered customs deposits made for plant, vehicles and equipment used at construction projects in Iraq.

L. Tangible property

145. With reference to losses of tangible property located in Iraq, decision 9 provides that where direct losses were suffered as a result of Iraq's invasion and occupation of Kuwait with respect to tangible assets, Iraq is liable for compensation (decision 9, paragraph 12). Typical actions of this kind would have been the expropriation, removal, theft or destruction of particular items of property by Iraqi authorities. Whether the taking of property was lawful or not is not relevant for Iraq's liability if it did not provide for compensation. Decision 9 furthermore provides that in a case where business property had been lost because it had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait, such loss may be considered as resulting directly from Iraq's invasion and occupation (decision 9, paragraph 13).

146. Many of the construction and engineering claims that come before this Panel are for assets that were confiscated by the Iraqi authorities in 1992 or 1993. Here the problem is one of causation. By

the time of the event, Iraq's invasion and occupation of Kuwait was over. Liberation was a year or more earlier. Numerous claimants had managed to obtain access to their sites to establish the position that obtained at that stage. In the cases the subject of this paragraph, the assets still existed. However, that initially satisfactory position was then overtaken by a general confiscation of assets by Iraqi authorities. While it sometimes seems to have been the case that this confiscation was triggered by an event which could be directly related to Iraq's invasion and occupation of Kuwait, in the vast majority of the claims that this Panel has seen, this was not the case. It was simply the result of a decision on the part of the authorities to take over these assets. This Panel has difficulty in seeing how these losses were caused by Iraq's invasion and occupation of Kuwait. On the contrary, it appears that they stem from an wholly independent event and accordingly are outside the jurisdiction of the Commission.

M. Payment or relief to others

147. Paragraph 21(b) of decision 7 specifically provides that losses suffered as a result of "the departure of persons from or their inability to leave Iraq or Kuwait" are to be considered the direct result of Iraq's invasion and occupation of Kuwait. Consistent with decision 7, therefore, the Panel finds that evacuation and relief costs incurred in assisting employees in departing from Iraq are compensable to the extent proven.

148. Paragraph 22 of Governing Council decision 7 provides that "payments are available to reimburse payments made or relief provided by corporations or other entities to others - for example, to employees, or to others pursuant to contractual obligations - for losses covered by any of the criteria adopted by the Council".

149. In the Fourth Report, this Panel found that the costs associated with evacuating and repatriating employees between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proven by the claimant and are reasonable in the circumstances. Urgent temporary liabilities and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation, are in principle, compensable.

150. Many claimants do not provide a documentary trail detailing to perfection the expenses incurred in caring for their personnel and transporting them (and, in some instances, the employees of other companies who were stranded) out of a theatre of hostilities.

151. In these cases this Panel considers it appropriate to accept a level of documentation consistent with the practical realities of a difficult, uncertain and often hurried situation, taking into account the concerns necessarily involved. The loss sustained by claimants in these situations is the very essence of the direct loss suffered which is stipulated by Security Council resolution 687 (1991). Accordingly, the Panel uses its best judgment, after considering all relevant reports and the material at its disposal, to arrive at an appropriate recommendation for compensation.

N. Final awards, judgments and settlements

152. In the case of some of the projects in which claimants are seeking compensation from the Commission, there have been proceedings between the parties to the project contract leading to an

award or a judgment; or there has been a settlement between the claimant and another party to the relevant contract. In all such cases, one is concerned with finality. The award, judgment or settlement must be final – not subject to appeal or revision.

153. The claim that is then raised with the Commission is either for sums said not to have been included in the award or judgment or for sums said not to have been included in the settlement.

154. It follows that it will be a prerequisite to establish that that is in fact the case, namely that, for some reason, the claim resulting in the award, judgment or settlement did not raise or resolve the subject matter of the claim being put before the Commission. Sufficient evidence of this will be needed. The absence of an identifiable element in the award, judgment or settlement relating to the claim before the Commission does not necessarily mean that that it has not been addressed. The Tribunal that issued the award or judgment or the parties that concluded the settlement may have reached a single sum to cover a number of claims, including the claim in question; or the Tribunal may have considered that the claim was not maintainable. Equally, the claim may have been abandoned in, and as part of, the settlement. In such an event it would appear that the claim has been resolved and there is no loss left to be compensated. At that stage, it will be necessary to review the file to see if there is any special circumstance or material that would displace this initial conclusion. Absent such circumstance or material, no loss has been established. Sufficient evidence of an existing loss is essential if this Panel is to recommend compensation.

155. If, on the other hand, it is clear that the particular claim has not been adjudicated or settled, then it may be entertained by the Commission.
